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John Marshall

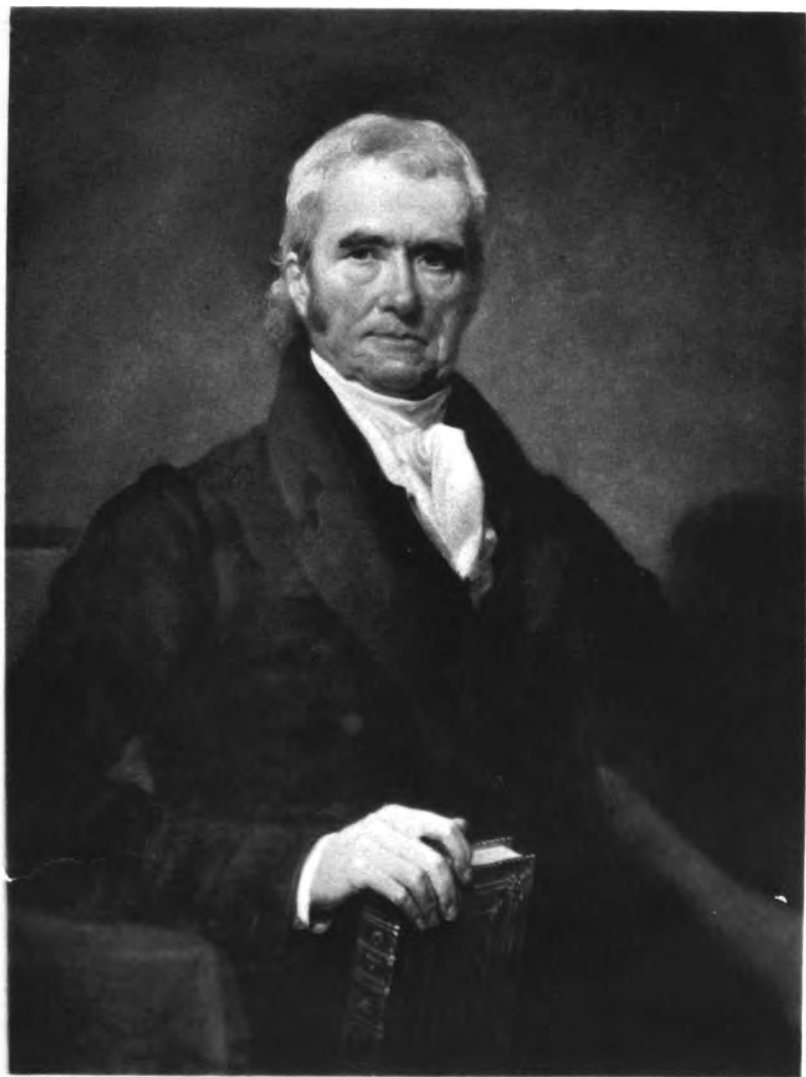
John Marshall, John M. Dillon

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JOHN MARSHALL

COMPLETE CONSTITUTIONAL DECISIONS

Edited with

**ANNOTATIONS HISTORICAL,
CRITICAL AND LEGAL**

By

JOHN M. DILLON

Of the New York Bar

ILLUSTRATED WITH PORTRAIT AND FAC-SIMILES

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PREFACE.

An eminent philosophic historian and statesman, whose lamented death occurred while this volume was passing through the press, has the following pregnant observations which are distinctly applicable to our Constitution, to our national experience, and to the permanent and increasing value of Chief Justice Marshall's constitutional labors. "An appetite for organic change," says Lecky,¹ "is one of the worst diseases that can affect a nation. All real progress, all sound national development, must grow out of a stable, persistent national character, deeply influenced by custom and precedent and old traditional reverence, habitually aiming at the removal of practical evils and the attainment of practical advantages, rather than speculative change. Institutions, like trees, can never attain their maturity or produce their proper fruits if their roots are perpetually tampered with. In no single point is the American Constitution more incontestably superior to our own than in the provisions by which it has so effectually barred the path of organic change that the appetite for such change has almost passed away."

¹ Democracy and Liberty, I, 153, 154.

The Constitution of the United States is the only political bond of union of the American Republic. John Marshall is the master-builder of the Constitution. By universal consent his work in this respect stands unrivaled and supreme. Conclusive proof of this, if proof were necessary, is found in the Centennial Celebration throughout the United States in 1901 of Marshall's appointment as Chief Justice of the Supreme Court. The record of this unique and extraordinary event is comprised in three commemorative volumes¹ which are referred to throughout the following work as the "Marshall Memorial."

The present volume contains in full every decision on constitutional points of Chief Justice Marshall. With the additions of the Thirteenth to Fifteenth Amendments, which grew out of the Civil War of 1861-1865, the Constitution of to-day is the Constitution of Marshall's time, and it means to-day just what Marshall's decisions authoritatively declared and established it to mean. The settled judgment of the world is that this Constitution is the most remarkable political document ever fashioned by the mind of man. No thorough knowledge of it is possible without a careful study of

¹ John Marshall, Life, Character and Judicial Services, as Portrayed in the Centenary and Memorial Addresses and Proceedings throughout the United States on Marshall Day, 1901, and in the classic orations of Binney, Story, Phelps, Waite and Rawle. Compiled and Edited with an Introduction by John F. Dillon. Illustrated with Portraits and Fac-simile; in Three Volumes, 1903.

Marshall's decisions. This may seem to be a strong expression, but it is absolutely true. To all persons, therefore, lay or professional, who feel an interest in the science of law, of jurisprudence or of government, and in the workings of republican institutions for over a century on a theater of more than imperial extent and grandeur and on the largest scale ever exhibited to mankind, the opinions here published have an intrinsic importance distinctively and exclusively their own.

Of few works can it truly be affirmed that they are equally adapted to popular and professional use. But this is undeniably true of Chief Justice Marshall's constitutional judgments. Many of the greatest and most luminous of his constitutional opinions contain scarcely a reference to adjudged cases or to the authority of precedents, for there were none, and the conclusions reached do not depend upon technical learning or discussions. They may be fully understood by any intelligent person. As Dr. Johnson would have phrased it, each decision is a colossus hewn from a rock, not figures carved on cherry stones; and on reading these opinions one has the satisfaction of seeing each successive stroke of the Titan which gradually evolved the massive and original work that he beholds.

In order that the volume may be more useful, a statement of the exact points decided has been prefixed to each case. Mr. Justice Curtis, one of the ablest judges

who ever held a place on the Supreme Bench of the United States, edited the Decisions of the Supreme Court. He appreciated the vital distinction between the points decided by the court and the arguments in support of the decision, and he embodied the points decided in head-notes, which are remarkable for their accuracy and conciseness and which have the added value of containing just what this learned and careful judge regarded as the precise propositions actually determined by the court. Mr. Justice Curtis's head-notes have, by the courtesy of Messrs. Little, Brown & Co., been adopted by the Editor, and they appear at the head of each of the Supreme Court opinions here published. To insure accuracy these opinions have been carefully compared with the original official reports.

It so happens that nearly every one of the great cases decided by Chief Justice Marshall has an interesting contemporaneous and subsequent history of its own, which forms an appropriate background and setting to the case. In the light of this history the opinion of the Chief Justice will be better understood and read with greater interest. This history together with such observations historical, general or critical as seemed proper precedes each case. The annotations at the foot of each opinion indicate how far the case itself has been subsequently referred to or applied; and thus this volume is intended to exhibit the present state of Constitutional Law on all

the great and essential provisions of the Constitution which were dealt with by Chief Justice Marshall.

Marshall's constitutional labors were the subject of orations and addresses on Marshall Day at the National Capital and in thirty-seven States and Territories, in which the opinions of Marshall are examined and reviewed by eminent judges, lawyers, statesmen and scholars. The present is therefore a companion volume to the "Marshall Memorial;" and among other features of interest or convenience it contains in the notes references to the "Marshall Memorial" in which will be found whatever was said on Marshall Day concerning the constitutional opinions of the great Chief Justice.

The Editor desires to express his obligation to the Honorable John F. Dillon, who edited the Marshall Memorial Volumes, for the prefatory notes to the opinions here given; for the other notes and editorial work the present Editor is responsible. He also gratefully acknowledges valuable assistance from his friend Mr. George S. Clay in the preparation and issue of this volume.

J. M. D.

New York, December, 1903.

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ILLUSTRATIONS.

PORTRAIT OF MARSHALL - - - *Frontispiece*

The frontispiece of the present volume is engraved by Gutekunst of Philadelphia, from the celebrated Inman portrait, generally regarded as the most satisfactory of all the portraits of the Chief Justice. The portrait was painted at the request of the Bar Association of Philadelphia, and the original now hangs in the rooms of the Law Association in that city. It represents the Chief Justice in his later life. The interesting proceedings of the Bar Association of Philadelphia which resulted in the production of this portrait, and other matters concerning it, will be found in the *Marshall Memorial*, Volume III, pages 430-433.

FACSIMILE OF THE LAST PAGE OF THE MSS.

OPINION OF CHIEF JUSTICE MARSHALL IN WOR-
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FACSIMILE OF LETTER OF CHIEF JUSTICE MAR- SHALL TO RICHARD PETERS, THE REPORTER, CONCERNING THE OPINION IN WORCESTER *v.*

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CONSTITUTIONAL OPINIONS

OF

CHIEF JUSTICE MARSHALL.

John Marshall was nominated as Chief Justice of the United States by President Adams on the 20th, unanimously confirmed by the Senate on the 27th, and commissioned on the 31st of January, 1801. On the day Marshall took his seat as Chief Justice, February 4, 1801, he addressed a letter to President Adams in which he acknowledges the honor conferred on him and concludes by saying that he will enter immediately on the duties of the office and hopes never to give occasion to the President to regret having made the appointment.

The first important constitutional question after Marshall's accession to the bench came before the court in the case of

William Marbury v. James Madison.

February Term, 1803.

[1 Cranch's Reports, 137-180.]

The decision of the Chief Justice is universally regarded as the substantial foundation of the distinctive constitutional law of this country.

The propositions of law decided in this case are thus

stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

An act of Congress repugnant to the Constitution is not law.

When the Constitution and an act of Congress are in conflict, the Constitution must govern the case to which both apply.

Congress cannot confer on this court any original jurisdiction.

To issue a writ of *mandamus*, requiring a Secretary of State to deliver a paper, would be an exercise of original jurisdiction not conferable by Congress, and not conferred by the Constitution on this court.

The thirteenth section of the Judiciary Act is inoperative, so far as it attempts to grant to this court power to issue writs of *mandamus* in classes of cases of original jurisdiction, not conferred by the Constitution on this court.

Briefly stated, the facts of the case are these: Toward the end of Adams' term as President he appointed a number of justices of the peace for the District of Columbia, which the Senate confirmed. Commissions to these officers, among them Marbury, had been made out, signed by the President, as the Constitution requires, sealed with the seal of the United States, and were ready for delivery, but remained undelivered in the office of the Secretary of State at the time Jefferson became President. The office was not one to which the President's power of removal extended. Jefferson's opinion was that the appointment was incomplete until consummated by *delivery* of the commission, and he forbade Madison, who was his Secretary of State, to deliver the commission to Marbury.¹

¹ Jefferson's Writings (Ford), X, 230; Marshall Memorial, I, 359.

Marbury contended that having been appointed by the President, confirmed by the Senate, and his commission signed and sealed, the appointment was complete and vested in him a legal right to the office, and that it was a violation of this right to withhold the commission.¹ Acting upon this theory, Marbury, at the December term, 1801, of the Supreme Court, by his counsel moved the court for a rule to Madison, Secretary of State, calling upon him to show cause why a *mandamus*² should not issue, commanding him to deliver to said Marbury his commission. The rule was granted and served; but no cause was shown by Madison. A *mandamus* was then moved for.

Because of its great importance we give the opinion of the Chief Justice at length, although one of the propositions discussed or decided, namely, that the commission was legally complete when the seal of the United States had been affixed to it by the Secretary of State, and that to withhold it was the violation of a positive legal right, is not strictly a constitutional question.³

¹ Marshall Memorial, I, 358, 359.

² A rule to show cause why a *mandamus* shall not issue is, in other words, a notice from the court calling upon the person to whom it is sent to make known to the court any reason, if he have any, why he should not be *positively required* to do some desired thing. The writ is called a *mandamus*, from its first word, meaning *we command*.

³ The court was constituted as follows:

JOHN MARSHALL, <i>Chief Justice</i> .	
WILLIAM CUSHING,	} <i>Justices.</i>
WILLIAM PATERSON,	
SAMUEL CHASE,	
BUSHEOD WASHINGTON,	
ALFRED MOORE,	

Opinion. **MARSHALL**, Chief Justice. At the last term,¹ on the affidavits then read and filed with the clerk, a rule was granted in this case, requiring the Secretary of State to show cause why a *mandamus* should not issue, directing him to deliver to William Marbury his commission as a justice of the peace for the county of Washington, in the District of Columbia.

No cause has been shown, and the present motion is for a *mandamus*. The peculiar delicacy of this case, the novelty of some of its circumstances, and the real difficulty attending the points which occur in it, require a complete exposition of the principles on which the opinion to be given by the court is founded.

These principles have been, on the side of the applicant, very ably argued at the bar. In rendering the opinion of the court there will be some departure in form, though not in substance, from the points stated in that argument.

In the order in which the court has viewed this sub-

¹ The last term was that of December, 1801, but between that term and the August term the Judiciary Act was amended, the August term abolished, and the sitting of the Supreme Court was suspended for fourteen months.

For a full review of the political conflict which brought about the amendment of the Judiciary Act, the abolishing of the August term of the Supreme Court of the United States and the appointment of the "midnight judges" by President Adams, which appointment gave rise to the celebrated case now considered, see McMaster, *Hist. of People of U. S.*, II, 532, 533; III, 164, 165; also Marshall Memorial, I, 430, 431.

The volumes of proceedings and addresses throughout the United States on February 4, 1901, the centenary of Marshall's appointment, known as "Marshall Day," edited by John F. Dillon and styled "John Marshall, Life, Character and Judicial Services," published by Callaghan & Company, Chicago, 1903, are referred to in the present publication as the "MARSHALL MEMORIAL."

ject, the following questions have been considered and decided:

1st. Has the applicant a right to the commission he demands? Questions stated.

2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

3d. If they do afford him a remedy, is it a *mandamus* issuing from this court?

The first object of inquiry is,—

1st. Has the applicant a right to the commission he demands?

His right originates in an act of Congress, passed in February, 1801, concerning the District of Columbia.

After dividing the district into two counties, the eleventh section of this law enacts “that there shall be appointed, in and for each of the said counties, such number of discreet persons to be justices of the peace as the President of the United States shall, from time to time, think expedient, to continue in office for five years.”

It appears from the affidavits that, in compliance with this law, a commission for William Marbury, as a justice of peace for the county of Washington, was signed by John Adams, then President of the United States; after which the seal of the United States was affixed to it; but the commission has never reached the person for whom it was made out.

In order to determine whether he is entitled to this commission, it becomes necessary to inquire whether he has been appointed to the office. For if he has been appointed, the law continues him in office for five years, and he is entitled to the possession of those evidences of office, which, being completed, became his property.

President's power of appointment of certain officers under article 2, section 2, of the Constitution of the United States.

The second section of the second article of the Constitution declares that "the President shall nominate, and, by and with the advice and consent of the Senate, shall appoint, ambassadors, other public ministers, and consuls, and all other officers of the United States whose appointments are not otherwise provided for."

The third section declares that "he shall commission all the officers of the United States."

An act of Congress directs the Secretary of State to keep the seal of the United States, "to make out, and record, and affix the said seal to, all civil commissions to officers of the United States, to be appointed by the President, by and with the consent of the Senate, or by the President alone; provided, that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States."

These are the clauses of the Constitution and laws of the United States which affect this part of the case. They seem to contemplate three distinct operations:

1st. The nomination. This is the sole act of the President, and is completely voluntary.

2d. The appointment. This is also the act of the President, and is also a voluntary act, though it can only be performed by and with the advice and consent of the Senate.

3d. The commission. To grant a commission to a person appointed might, perhaps, be deemed a duty enjoined by the Constitution. "He shall," says that instrument, "commission all the officers of the United States."

The acts of appointing to office, and commissioning the person appointed, can scarcely be considered as one and

the same; since the power to perform them is given in two separate and distinct sections of the Constitution. The distinction between the appointment and the commission will be rendered more apparent by adverting to that provision, in the second section of the second article of the Constitution, which authorizes Congress "to vest by law the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments;" thus contemplating cases where the law may direct the President to commission an officer appointed by the courts, or by the heads of departments. In such a case, to issue a commission would be apparently a duty distinct from the appointment, the performance of which, perhaps, could not legally be refused.

Although that clause of the Constitution which requires the President to commission all the officers of the United States may never have been applied to officers appointed otherwise than by himself, yet it would be difficult to deny the legislative power to apply it to such cases. Of consequence the constitutional distinction between the appointment to an office and the commission of an officer who has been appointed remains the same as if, in practice, the President had commissioned officers appointed by an authority other than his own.

It follows, too, from the existence of this distinction, that, if an appointment was to be evidenced by any public act other than the commission, the performance of such public act would create the officer; and, if he was not removable at the will of the President, would either give him a right to his commission, or enable him to perform the duties without it.

These observations are premised solely for the purpose of rendering more intelligible those which apply more directly to the particular case under consideration.

Progressive steps necessary to complete the appointment to office.

This is an appointment made by the President, by and with the advice and consent of the Senate, and is evidenced by no act but the commission itself. In such a case, therefore, the commission and the appointment seem inseparable; it being almost impossible to show an appointment otherwise than by proving the existence of a commission. Still, the commission is not necessarily the appointment, though conclusive evidence of it.

But at what stage does it amount to this conclusive evidence?

The answer to this question seems an obvious one. The appointment, being the sole act of the President, must be completely evidenced when it is shown that he has done everything to be performed by him.

Should the commission, instead of being evidence of an appointment, even be considered as constituting the appointment itself,—still, it would be made when the last act to be done by the President was performed, or, at furthest, when the commission was complete.

The last act to be done by the President is the signature of the commission. He has then acted on the advice and consent of the Senate to his own
Idem. nomination. The time for deliberation has then passed. He has decided. His judgment, on the advice and consent of the Senate concurring with his nomination, has been made and the officer is appointed. This appointment is evidenced by an open, unequivocal act; and being the last act required from the person making it, necessarily excludes the idea of its being, so far as

respects the appointment, an inchoate and incomplete transaction.

Some point of time must be taken when the power of the executive over an officer not removable at his will must cease. That point of time must be when the constitutional power of appointment has been exercised. And this power has been exercised when the last act required from the person possessing the power has been performed. This last act is the signature of the commission. This idea seems to have prevailed with the Legislature when the act passed converting the Department of Foreign Affairs into the Department of State. By that act it is enacted that the Secretary of State shall keep the seal of the United States, "and shall make out and record, and shall affix the said seal to, all civil commissions to officers of the United States to be appointed by the President;" "provided, that the said seal shall not be affixed to any commission before the same shall have been signed by the President of the United States; nor to any other instrument or act without the special warrant of the President therefor."

Signature of President completes the appointment, affixing the seal completes the commission.

The signature is a warrant for affixing the great seal to the commission; and the great seal is only to be affixed to an instrument which is complete. It attests, by an act supposed to be of public notoriety, the verity of the Presidential signature.

It is never to be affixed till the commission is signed, because the signature, which gives force and effect to the commission, is conclusive evidence that the appointment is made.

The commission being signed, the subsequent duty of

the Secretary of State is prescribed by law and not to be guided by the will of the President. He is to affix the seal of the United States to the commission and is to record it.

This is not a proceeding which may be varied, if the judgment of the executive shall suggest one more eligible;

These exact steps are accurately marked out and must be strictly pursued. but is a precise course accurately marked out by law, and is to be strictly pursued. It is the duty of the Secretary of State to conform to the law; and in this he is an officer of the United States, bound to obey the laws. He acts, in this respect, as has been very properly stated at the bar, under the authority of law, and not by the instructions of the President. It is a ministerial act which the law enjoins on a particular officer for a particular purpose.

If it should be supposed that the solemnity of affixing the seal is necessary not only to the validity of the commission, but even to the completion of an appointment, still, when the seal is affixed the appointment is made, and the commission is valid. No other solemnity is required by law; no other act is to be performed on the part of government. All that the executive can do to invest the person with his office is done; and unless the appointment be then made, the executive cannot make one without the co-operation of others.

After searching anxiously for the principles on which a contrary opinion may be supported, none have been found which appear of sufficient force to maintain the opposite doctrine.

Such as the imagination of the court could suggest have been very deliberately examined, and after allowing them all the weight which it appears possible to give

them, they do not shake the opinion which has been formed.

In considering this question, it has been conjectured that the commission may have been assimilated to a deed, to the validity of which delivery is essential.¹

This idea is founded on the supposition that the commission is not merely evidence of an appointment, but is itself the actual appointment; a supposition by no means unquestionable. But for the purpose of examining this objection fairly, let it be conceded that the principle claimed for its support is established.

The appointment being, under the Constitution, to be made by the President personally, the delivery of the deed of appointment, if necessary to its completion, must be made by the President also. It is not necessary that the delivery should be made personally to the grantee of the office; it never is so made. The law would seem to contemplate that it should be made to the Secretary of State, since it directs the Secretary to affix the seal to the commission *after* it shall have been signed by the President. If, then, the act of livery be necessary to give validity to the commission, it has been delivered when executed and given to the Secretary for the purpose of being sealed, recorded, and transmitted to the party.

Why delivery to appointee not essential to completion of appointment.

But in all cases of letters patent certain solemnities are required by law, which solemnities are the evidences of the validity of the instrument. A formal delivery to the person is not among them. In cases of commissions, the sign-manual of the President, and the seal of the

¹ For Jefferson's contention concerning delivery, see Jefferson's Writings (Ford), X, 230; Marshall Memorial, I, 359.

United States, are those solemnities. This objection, therefore, does not touch the case.

It has also occurred as possible, and barely possible, that the transmission of the commission, and the acceptance thereof, might be deemed necessary to complete the right of the plaintiff.

The transmission of the commission is a practice directed by convenience, but not by law. It cannot, there-

fore, be necessary to constitute the appointment,
Idem.

which must precede it, and which is the mere act of the President. If the executive required that every person appointed to an office should himself take means to procure his commission, the appointment would not be the less valid on that account. The appointment is the sole act of the President; the transmission of the commission is the sole act of the officer to whom that duty is assigned, and may be accelerated or retarded by circumstances which can have no influence on the appointment. A commission is transmitted to a person already appointed; not to a person to be appointed or not, as the letter inclosing the commission should happen to get into the post-office and reach him in safety, or to miscarry.

It may have some tendency to elucidate this point to inquire whether the possession of the original commission be indispensably necessary to authorize a person appointed to any office to perform the duties of that office. If it was necessary, then a loss of the commission would lose the office. Not only negligence, but accident or fraud, fire or theft, might deprive an individ-

Hypothetical cases put to prove that delivery is not necessary.

ual of his office. In such a case, I presume, it could not be doubted but that a copy from the record of the office of the Secretary of State would be, to every intent and purpose, equal to the

original. The act of Congress has expressly made it so. To give that copy validity it would not be necessary to prove that the original had been transmitted and afterwards lost. The copy would be complete evidence that the original had existed, and that the appointment had been made, but not that the original had been transmitted. If, indeed, it should appear that the original had been mislaid in the office of State, that circumstance would not affect the operation of the copy. When all the requisites have been performed which authorize a recording officer to record any instrument whatever, and the order for that purpose has been given, the instrument is, in law, considered as recorded, although the manual labor of inserting it in a book kept for that purpose may not have been performed.

In the case of commissions the law orders the Secretary of State to record them. When, therefore, they are signed and sealed, the order for their being recorded is given, and, whether inserted in the book or not, they are, in law, recorded.

A copy of this record is declared equal to the original, and the fees to be paid by a person requiring a copy are ascertained by law. Copy of the record equal to the original.
 Can a keeper of a public record erase therefrom a commission which has been recorded? Or can he refuse a copy thereof to a person demanding it on the terms prescribed by law?

Such a copy would, equally with the original, authorize the justice of peace to proceed in the performance of his duty, because it would, equally with the original, attest his appointment.

If the transmission of a commission be not considered as necessary to give validity to an appointment, still less

Acceptance of appointment not necessary to give validity to appointment.

is its acceptance. The appointment is the sole act of the President; the acceptance is the sole act of the officer, and is, in plain common sense, posterior to the appointment. As he may resign, so may he refuse to accept; but neither the one nor the other is capable of rendering the appointment a nonentity.

That this is the understanding of the government is apparent from the whole tenor of its conduct.

Commission bears date from time of appointment and not from transmission or acceptance of appointee.

A commission bears date, and the salary of the officer commences, from his appointment; not from the transmission or acceptance of his commission. When a person appointed to any office refuses to accept that office, the successor is nominated in the place of the person who has declined to accept, and not in the place of the person who had been previously in office, and had created the original vacancy.

It is, therefore, decidedly the opinion of the court that, when a commission has been signed by the President, the appointment is made; and that the commission is complete when the seal of the United States has been affixed to it by the Secretary of State.

Distinction made in cases where President's power of removal extends and where it does not.

Where an officer is removable at the will of the executive, the circumstance which completes his appointment is of no concern; because the act is at any time revocable; and the commission may be arrested, if still in the office. But when the officer is not removable at the will of the executive, the appointment is not revocable, and cannot be annulled. It has conferred legal rights which cannot be resumed.

The discretion of the executive is to be exercised until

the appointment has been made. But having once made the appointment, his power over the office is terminated in all cases where by law the officer is not removable by him. The right to the office is *then* in the person appointed, and he has the absolute, unconditional power of accepting or rejecting it.

Mr. Marbury, then, since his commission was signed by the President, and sealed by the Secretary of State, was appointed; and as the law creating the office gave the officer a right to hold for five years, independent of the executive, the appointment was not revocable, but vested in the officer legal rights, which are protected by the laws of his country.

Marbury being appointed, and the appointment not being revocable, he is vested with legal rights which are protected by law.

To withhold his commission, therefore, is an act deemed by the court not warranted by law, but violative of a vested legal right.

To withhold his commission is a violation of a vested legal right.

This brings us to the second inquiry; which is,—

2d. If he has a right, and that right has been violated, do the laws of his country afford him a remedy?

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws whenever he receives an injury. One of the first duties of government is to afford that protection. In Great Britain the king himself is sued in the respectful form of a petition, and he never fails to comply with the judgment of his court.

In the third volume of his Commentaries, page 23, Blackstone states two cases in which a remedy is afforded by mere operation of law.

"In all other cases," he says, "it is a general and indisputable rule, that,

"Where there is a legal right there is also a legal remedy."

where there is a legal right, there is also a legal remedy by suit, or action at law, whenever that right is invaded."

And afterwards, page 109 of the same volume, he says: "I am next to consider such injuries as are cognizable by the courts of the common law. And herein I shall for the present only remark that all possible injuries whatsoever, that did not fall within the exclusive cognizance of either the ecclesiastical, military or maritime tribunals, are, for that very reason, within the cognizance of the common-law courts of justice; for it is a settled and invariable principle in the laws of England that every right when withheld must have a remedy, and every injury its proper redress."

Every right when withheld must have a remedy, and every injury its proper redress.

The Government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It behooves us, then, to inquire whether there be in its composition any ingredient which shall exempt it from legal investigation or exclude the injured party from legal redress. In pursuing this inquiry the first question which presents itself is whether this can be arranged

This case not within the class of a loss without an injury.

with that class of cases which come under the description of *damnum absque injuria*, a loss without an injury.

This description of cases never has been considered, and it is believed never can be considered, as compre-

hending offices of trust, of honor, or of profit. The office of justice of peace in the District of Columbia is such an office; it is, therefore, worthy of the attention and guardianship of the laws. It has received that attention and guardianship. It has been created by special act of Congress, and has been secured, so far as the laws can give security, to the person appointed to fill it, for five years. It is not, then, on account of the worthlessness of the thing pursued that the injured party can be alleged to be without remedy.

Is it in the nature of the transaction? Is the act of delivering or withholding a commission to be considered as a mere political act belonging to the executive department alone, for the performance of which entire confidence is placed by our Constitution in the supreme executive; and for any misconduct respecting which the injured individual has no remedy?

That there may be such cases is not to be questioned; but that every act of duty to be performed in any of the great departments of government constitutes such a case is not to be admitted. Illustration.

By the act concerning invalids, passed in June, 1794 (vol. 3, p. 112), the Secretary at War is ordered to place on the pension-list all persons whose names are contained in a report previously made by him to Congress. If he should refuse to do so, would the wounded veteran be without remedy? Is it to be contended that, where the law in precise terms directs the performance of an act in which an individual is interested, the law is incapable of securing obedience to its mandate? Is it on account of the character of the person against whom the complaint is made? Is it to be contended that the heads of departments are not amenable to the laws of their country?

Whatever the practice on particular occasions may be, the theory of this principle will certainly never be maintained. No act of the Legislature confers so extraordinary a privilege, nor can it derive countenance from the doctrines of the common law. After stating that personal injury from the king to a subject is presumed to be impossible, Blackstone (vol. 3, p. 255) says: "But injuries to the rights of property can scarcely be committed by the Crown without the intervention of its officers, for whom the law, in matters of right, entertains no respect or delicacy, but furnishes various methods of detecting the errors and misconduct of those agents by whom the King has been deceived and induced to do a temporary injustice."

By the act passed in 1796, authorizing the sale of the lands above the mouth of Kentucky river (vol. 3, p. 299), the purchaser, on paying his purchase-money, becomes completely entitled to the property purchased, and on producing to the Secretary of State the receipt of the Treasurer, upon a certificate required by the law, the President of the United States is authorized to grant him a patent. It is further enacted that all patents shall be countersigned by the Secretary of State and recorded in his office. If the Secretary of State should choose to withhold this patent, or, the patent being lost, should refuse a copy of it, can it be imagined that the law furnishes to the injured person no remedy?

Hypothetical case put to elucidate point.

It is not believed that any person whatever would attempt to maintain such a proposition.

It follows, then, that the question, whether the legality of an act of the head of a department be examinable in

a court of justice or not, must always depend on the nature of that act.

If some acts be examinable and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction.

In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.

By the Constitution of the United States the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience. To aid him in the performance of these duties, he is authorized to appoint certain officers who act by his authority and in conformity with his orders.

In such cases their acts are his acts, and whatever opinion may be entertained of the manner in which executive discretion may be used, still there exists and can exist no power to control that discretion. The subjects are political. They respect the Nation, not individual rights; and being intrusted to the executive, the decision of the executive is conclusive. The application of this remark will be perceived by adverting to the act of Congress for establishing the Department of Foreign Affairs. This officer, as his duties were prescribed by that act, is to conform precisely to the will of the President. He is the mere organ by whom that will is communicated. The acts of such an officer as an officer can never be examinable by the courts.

But when the Legislature proceeds to impose on that officer other duties; when he is directed peremptorily to perform certain acts; when the rights of individuals are

dependent on the performance of those acts,— he is so far the officer of the law; is amenable to the laws for his conduct; and cannot at his discretion sport away the vested rights of others.

The conclusion from this reasoning is that where the heads of departments are the political or confidential agents of the executive, merely to execute the will of the President, or rather to act in cases in which the executive possesses a constitutional or legal discretion, nothing can be more perfectly clear than that their acts are only politically examinable. But where a specific duty is assigned by law, and individual rights depend upon the performance of that duty, it seems equally clear that the individual who considers himself injured has a right to resort to the laws of his country for a remedy.

If this be the rule, let us inquire how it applies to the case under the consideration of the court.

The power of nominating to the Senate, and the power of appointing the person nominated, are political powers, to be exercised by the President according to his own discretion. When he has made an appointment he has exercised his whole power, and his discretion has been completely applied to the case. If, by law, the officer be removable at the will of the President, then a new appointment may be immediately made, and the rights of the officer are terminated. But as a fact which has existed cannot be made never to have existed, the appointment cannot be annihilated; and, consequently, if the officer is by law not removable at the will of the President, the rights he has acquired are protected by the law, and are not resumable by the President. They

Distinction where acts may only be politically examinable and where a right to resort to law for a remedy.

cannot be extinguished by executive authority; and he has the privilege of asserting them in like manner as if they had been derived from any other source.

The question, whether a right has vested or not, is in its nature judicial, and must be tried by the judicial authority. If, for example, Mr. Marbury had taken the oaths of a magistrate, and proceeded to act as one, in consequence of which a suit had been instituted against him, in which his defense had depended on his being a magistrate, the validity of his appointment must have been determined by judicial authority.

Whether a right has vested or not is in its nature a judicial question.

So, if he conceives that, by virtue of his appointment, he has a legal right either to the commission which has been made out for him, or to a copy of that commission, it is equally a question examinable in a court, and the decision of the court upon it must depend on the opinion entertained of his appointment.

That question has been discussed, and the opinion is that the latest point of time which can be taken as that at which the appointment was complete, and evidenced, was when, after the signature of the President, the seal of the United States was affixed to the commission.

It is, then, the opinion of the court:

1st. That, by signing the commission of Mr. Marbury, the President of the United States appointed him a justice of peace for the county of Washington, in the District of Columbia; and that the seal of the United States, affixed thereto by the Secretary of State, is conclusive testimony of the verity of the signature, and of the completion of the appointment; and that the appoint-

Marbury's right to office and the violation of that right in this case.

ment conferred on him a legal right to the office for a space of five years.

2d. That, having this legal title to the office, he has a consequent right to the commission; a refusal to deliver which is a plain violation of that right for which the laws of his country afford him a remedy.

It remains to be inquired whether:

Is Marbury entitled to the remedy for which he applies?

3d. He is entitled to the remedy for which he applies. This depends on,—

1st. The nature of the writ applied for; and,—

2d. The power of this court.

1st. The nature of the writ.

Blackstone's definition of mandamus.

Blackstone, in the third volume of his Commentaries, page 110, defines a *mandamus* to be "a command issuing in the King's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the King's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes to be consonant to right and justice.

Lord Mansfield, in the case of *The King v. Baker et al.* (3 Burrow's Reports, 1266), states, with much precision and explicitness, the cases in which this writ may be used.

"Whenever," says that very able judge, "there is a right to execute an office, perform a service, or exercise

Mansfield states cases where this writ may be used.

a franchise (more especially if it be in a matter of public concern, or attended with profit), and a person is kept out of possession, or dispossessed of such right, and has no other specific legal remedy, this court ought to assist by *mandamus*, upon reasons of justice, as the

writ expresses, and upon reasons of public policy, to preserve peace, order, and good government." In the same case he says, "This writ ought to be used upon all occasions where the law has established no specific remedy, and where in justice and good government there ought to be one."

In addition to the authorities now particularly cited, many others were relied on at the bar, which show how far the practice has conformed to the general doctrines that have been just quoted.

This writ, if awarded, would be directed to an officer of government, and its mandate to him would be, to use the words of Blackstone, "to do a particular thing therein specified which appertains to his office and duty, and which the court has previously determined, or at least supposes, to be consonant to right and justice." Or, in the words of Lord Mansfield, the applicant in this case has a right to execute an office of public concern, and is kept out of possession of that right.

These circumstances certainly concur in this case.

Still to render the *mandamus* a proper remedy, the officer to whom it is to be directed must be one to whom on legal principles such writ may be directed; and the person applying for it must be without any other specific and legal remedy.

1st. With respect to the officer to whom it would be directed. The intimate political relation subsisting between the President of the United States and the heads of departments necessarily renders any legal investigation of the acts of one of those high officers peculiarly irksome as well as delicate, and excites some hesitation with respect to the propriety of entering into such investigation. Impressions are often received without

much reflection or examination, and it is not wonderful that in such a case as this the assertion by an individual of his legal claims in a court of justice, to which claims it is the duty of that court to attend, should at first view be considered by some as an attempt to intrude into the Cabinet and to intermeddle with the prerogatives of the executive.

The court disclaims all idea of attempts at intrusion into the Cabinet or meddling with prerogatives of the executive.

It is scarcely necessary for the court to disclaim all pretensions to such a jurisdiction. An extravagance so absurd and excessive could not have been entertained for a moment. The province of the court is solely to decide on the rights of individuals, not to inquire how the executive or executive officers perform duties in which they have a discretion. Questions in their nature political, or which are by the Constitution and laws submitted to the executive, can never be made in this court.

But if this be not such a question; if, so far from being an intrusion into the secrets of the Cabinet, it respects a paper which according to law is upon record, and to a copy of which the law gives a right on the payment of ten cents; if it be no intermeddling with a subject over which the executive can be considered as having exercised any control; what is there in the exalted station of the officer which shall bar a citizen from asserting in a court of justice his legal rights, or shall forbid a court to listen to the claim, or to issue a *mandamus* directing the performance of a duty not depending on executive discretion, but on particular acts of Congress and the general principles of law?

If one of the heads of departments commits any illegal act, under color of his office, by which an individual sustains an injury, it cannot be pretended that his office

Reasons given why it is not an intrusion.

alone exempts him from being sued in the ordinary mode of proceeding, and being compelled to obey the judgment of the law. How, then, can his office exempt him from this particular mode of deciding on the legality of his conduct, if the case be such a case as would, were any other individual the party complained of, authorize the process ?

It is not by the office of the person to whom the writ is directed, but the nature of the thing to be done, that the propriety or impropriety of issuing a *mandamus* is to be determined. Where the head of a department acts in a case in which executive discretion is to be exercised, in which he is the mere organ of executive will, it is again repeated, that any application to a court to control, in any respect, his conduct, would be rejected without hesitation.

Propriety of issuing *mandamus* is determined by the nature of the thing to be done, not by the office of the person to whom writ is directed.

But where he is directed by law to do a certain act affecting the absolute rights of individuals, in the performance of which he is not placed under the particular direction of the President, and the performance of which the President cannot lawfully forbid, and therefore is never presumed to have forbidden — as, for example, to record a commission, or a patent for land, which has received all the legal solemnities; to give a copy of such record, — in such cases it is not perceived on what ground the courts of the country are further excused from the duty of giving judgment that right be done to an injured individual, than if the same services were to be performed by a person not the head of a department.

This opinion seems not now for the first time to be taken up in this country.

It must be well recollected that in 1792 an act passed

directing the Secretary at War to place on the pension-list such disabled officers and soldiers as should be reported to him by the Circuit Courts, which act, so far as the duty was imposed on the courts, was deemed unconstitutional; but some of the judges, thinking that the law might be executed by them in the character of commissioners, proceeded to act and to report in that character.

Non-judicial duties cannot be imposed on the courts. Illustration.

This law being deemed unconstitutional at the circuits was repealed and a different system was established; but the question whether those persons who had been reported by the judges, as commissioners, were entitled, in consequence of that report, to be placed on the pension-list was a legal question properly determinable in the courts, although the act of placing such persons on the list was to be performed by the head of a department.

That this question might be properly settled, Congress passed an act, in February, 1793, making it the duty of the Secretary of War, in conjunction with the Attorney-General, to take such measures as might be necessary to obtain an adjudication of the Supreme Court of the United States on the validity of any such rights claimed under the act aforesaid.

After the passage of this act a *mandamus* was moved for, to be directed to the Secretary at War, commanding him to place on the pension-list a person stating himself to be on the report of the judges.¹

There is, therefore, much reason to believe that this mode of trying the legal right of the complainant was deemed by the head of a department, and by the highest

¹ See note at end of this case.

law officer of the United States, the most proper which could be selected for the purpose.

When the subject was brought before the court the decision was not that a *mandamus* would not lie to the head of a department directing him to perform an act enjoined by law, in the performance of which an individual had a vested interest, but that a *mandamus* ought not to issue in that case; the decision necessarily to be made if the report of the commissioners did not confer on the applicant a legal right.

The judgment in that case is understood to have decided the merits of all claims of that description, and the persons on the report of the commissioners found it necessary to pursue the mode prescribed by the law subsequent to that which had been deemed unconstitutional, in order to place themselves on the pension-list.

The doctrine, therefore, now advanced is by no means a novel one.

The doctrine now advanced not a novel one.

It is true that the *mandamus* now moved for is not for the performance of an act expressly enjoined by statute.

It is to deliver a commission, on which subject the acts of Congress are silent. This difference is not considered as affecting the case. It has already been stated that the applicant has to that commission a vested legal right of which the executive cannot deprive him. He has been appointed to an office from which he is not removable at the will of the executive, and being so appointed he has a right to the commission which the Secretary has received from the President for his use. The act of Congress does not indeed order the Secretary of State to send it to him, but it is placed in his hands for the person entitled to it, and cannot be more lawfully withheld by him than by any other person.

It was at first doubted whether the action of detinue was not a specific legal remedy for the commission which has been withheld from Mr. Marbury; in which case a *mandamus* would be improper. But this doubt has yielded to the consideration that the judgment in detinue is for the thing itself, or its value. The value of a public office not to be sold is incapable of being ascertained; and the applicant has a right to the office itself, or to nothing. He will obtain the office by obtaining the commission, or a copy of it from the record.

Plain case for a *mandamus*.

This, then, is a plain case for a *mandamus*, either to deliver the commission or a copy of it from the record; and it only remains to be inquired,—

Whether it can issue from this court.

Power of Supreme Court to issue a *mandamus* in this case.

The act to establish the judicial courts of the United States authorizes the Supreme Court “to issue writs of *mandamus*, in cases warranted by the principles and usages of law to any courts appointed, or persons holding office, under the authority of the United States.”

The Secretary of State being a person holding an office under the authority of the United States is precisely within the letter of the description; and if this court is not authorized to issue a writ of *mandamus* to such an officer, it must be because the law is unconstitutional, and therefore absolutely incapable of conferring the authority and assigning the duties which its words purport to confer and assign.

Judicial power vested in one Supreme Court by the Constitution.

The Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall from time to time ordain and

establish. This power is expressly extended to all cases arising under the laws of the United States; and consequently, in some form, may be exercised over the present case; because the right claimed is given by a law of the United States.

In the distribution of this power it is declared that "the Supreme Court shall have original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be a party. In all other cases the Supreme Court shall have appellate jurisdiction."

It has been insisted at the bar, that, as the original grant of jurisdiction to the Supreme Court and inferior courts is general, and the clause assigning original jurisdiction to the Supreme Court contains no negative or restrictive words, the power remains to the Legislature to assign original jurisdiction to that court in other cases than those specified in the article which has been recited; provided those cases belong to the judicial power of the United States.

Point made that the Supreme Court has no jurisdiction in this matter.

If it had been intended to leave it in the discretion of the Legislature to apportion the judicial power between the Supreme and inferior courts according to the will of that body, it would certainly have been useless to have proceeded further than to have defined the judicial power, and the tribunals in which it should be vested. The subsequent part of the section is mere surplusage, is entirely without meaning, if such is to be the construction. If Congress remains at liberty to give this court appellate jurisdiction, where the Constitution has declared their jurisdiction shall be original; and original jurisdiction, where the Constitution has declared it shall be appellate,

The reasons why under the Constitution this court has jurisdiction.

the distribution of jurisdiction made in the Constitution is form without substance.

Affirmative words are often in their operation negative of other objects than those affirmed; and in this case a negative or exclusive sense must be given to them, or they have no operation at all.

It cannot be presumed that any clause in the Constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it.

If the solicitude of the convention respecting our peace with foreign powers induced a provision that the Supreme Court should take original jurisdiction in cases which might be supposed to affect them, yet the clause would have proceeded no further than to provide for such cases, if no further restriction on the powers of Congress had been intended. That they should have appellate jurisdiction in all other cases, with such exceptions as Congress might make, is no restriction, unless the words be deemed exclusive of original jurisdiction.

When an instrument organizing fundamentally a judicial system divides it into one Supreme and so many inferior courts as the Legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them as to define the jurisdiction of the Supreme Court, by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction, the plain import of the words seems to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.

To enable this court then to issue a *mandamus* it must be shown to be an exercise of appellate jurisdiction or to be necessary to enable them to exercise appellate jurisdiction.

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a *mandamus* should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.

It is the essential criterion of appellate jurisdiction that it revises and corrects the proceedings in a cause already instituted and does not create that cause. Although, therefore, a *mandamus* may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is in effect the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate but to original jurisdiction. Neither is it necessary in such a case as this to enable the court to exercise its appellate jurisdiction.

The authority, therefore, given to the Supreme Court by the act establishing the judicial courts of the United States to issue writs of *mandamus* to public officers appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles supposed to have been long and well established to decide it.

An act repugnant to the Constitution cannot become the law of the land.

That the people have an original right to establish for their future government such principles as in their opinion shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion, nor can it, nor ought it to be frequently repeated. The principles, therefore, so established are deemed fundamental. And as the authority from which they proceed is supreme and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here or establish certain limits not to be transcended by those departments.¹

The government of the United States is of the latter description. The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten the Constitution is written. To what purpose are powers limited and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they are imposed and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or that the Legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior, paramount law,

¹ See *Federalist*, No. 78.

unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the Legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts on the part of the people to limit a power in its own nature illimitable.

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the Legislature repugnant to the Constitution is void.

This theory is essentially attached to a written Constitution, and is consequently to be considered by this court as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

Essential theory and purpose of a written Constitution.

If an act of the Legislature repugnant to the Constitution is void, does it, notwithstanding its invalidity, bind the courts and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory, and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each.

So, if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution and see only the law.

This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written Constitution, would of itself be sufficient in America, where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the

peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges, and, if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

*Illustrations from
other sections of the
Constitution.*

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it, ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution and only see the law?

The Constitution declares "that no bill of attainder or *ex post facto* law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed es-

pecially to the courts. It prescribes directly for them a rule of evidence not to be departed from. If the Legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of *courts*, as well as of the Legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the Legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons and do equal right to the poor and to the rich; and that, I will faithfully and impartially discharge all the duties incumbent on me as ———, according to the best of my abilities and understanding, agreeably to *the Constitution* and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that,

in declaring what shall be the *supreme* law of the land, the *Constitution* itself is first mentioned, and not the laws of the United States generally, but those only which shall be made in *pursuance* of the Constitution, have that rank.

Thus the particular phraseology of the Constitution of the United States confirms and strengthens the principle supposed to be essential to all written Constitutions that a law repugnant to the Constitution is void, and that *courts*, as well as other departments, are bound by that instrument.

The rule must be discharged.

NOTE.

Commenting on *Marbury v. Madison*, Parsons says:¹

"I should not do justice to my own deliberate belief did I not say that I think this decision is not surpassed in the ability it displays, nor equaled in its utility, by any case in the multitudinous records of English or American jurisprudence."²

Chancellor Kent's observations are not the less striking. He says:

"This great question may be regarded as now finally settled, and I consider it to be one of the most interesting points in favor of constitutional liberty and of the security of property in this country that has ever been judicially determined. In *Marbury against Madison* this subject was brought under the consideration of the Supreme Court of the United States and received a clear and elaborate discussion. The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any State Legislature, were declared in an argument approaching to the precision and certainty of a mathematical demonstration."³

¹ Marshall Memorial, I, 362, 363.

² American Law Review, 1865, p. 432, "John Marshall."

³ Kent's Comm., Vol. I, pp. 453, 454.

More impressive and emphatic still is the utterance of one of the most eloquent and able lawyers of the American Bar:

"I do not know," said Rufus Choate, "that I can point to one achievement in American statesmanship which can take rank for its consequences of good above that single decision of the Supreme Court which adjudged that an act of the Legislature contrary to the Constitution is void, and that the judicial department is clothed with the power to ascertain the repugnancy and pronounce the legal conclusion. That the framers of the Constitution intended this to be so is certain; but to have asserted it against Congress and the Executive, to have vindicated it by that easy yet adamant demonstration than which the reasonings of mathematics show nothing surer, to have inscribed this vast truth of conservatism upon the public mind, so that no demagogue not in the last stages of intoxication denies it,—this is an achievement of statesmanship [of the judiciary] of which a thousand years may not exhaust or reveal all the good."

Referring to Marbury's case, one of the greatest of constitutional judges in this country, the late Mr. Justice Miller, declared that "the immense importance of this decision [*Marbury v. Madison*], though in some respects *obiter*, since the court declared in the end that they had no jurisdiction of the case, may be appreciated when it is understood that the principles declared, which have never since been controverted, subjected the ministerial and executive officers of the government all over the country to the control of the courts in regard to the execution of a large part of their duties, and whose application to the very highest officers of the government, except, perhaps, the President, has been illustrated in numerous cases in the courts of the United States. In fact," he says, "its assertion or denial makes just the difference, as Marshall tersely said in that opinion, between 'a government of laws and a government of men.'"¹

"For the following very complete note of the prior cases [on the subject of the power of courts to declare

¹ Historical Address upon the Supreme Court, Philadelphia, 1889; Miller on the Constitution, p. 386; Marshall Memorial, I, 360.

statutes in conflict with the Constitution to be void] I am indebted to Ardemus Stewart, Esq., of the Philadelphia Bar. *Comm. v. Caton*, 4 Call, 5 (Va., 1782); *Cases of the Judges of the Court of Appeals*, 4 Call, 135 (Va., 1788); *Trevett v. Weeden* (R. I., 1786), *Arnold's Hist. of R. I.*, vol. 2, ch. 24, and see *Cooley's Constitutional Limitations*, 193, n. 3; *Den on Demise of Bayard v. Singleton*, 1 Martin, 48 (N. C., 1787); *Ogden v. Witherspoon*, 2 Hayward, 227 (N. C., 1799); *Bowman v. Middleton*, 1 Bay, 252 (S. C., 1792); *Austin's Lessee v. Trustees, etc.* (Pa., 1793), referred to in *Emerick v. Harris*, 1 Binney, 416; case of *Holmes and Walton*, and *Taylor v. Reading*, in New Jersey, cited by Kirkpatrick, C. J., in *State v. Parkhurst*, 4 Halsted (9 N. J. Law), 427; *Van Horne v. Dorrance*, 2 Dall. 304 (1795).

"On April 5, 1792, the Circuit Court for the District of New York, consisting of Chief Justice Jay, Justice Cushing, and Duane, District Judge, declared it as their unanimous opinion that the pension law passed by Congress on March 23, 1792, was invalid, because it attempted to assign to the judicial department duties which were not judicial; on June 8, 1792, the Circuit Court for the District of North Carolina made a similar declaration in a joint letter, addressed to the President of the United States; and on April 18, 1792, the Circuit Court for the District of Pennsylvania addressed a similar joint letter to the President. Somewhat later in the same year the Supreme Court of the United States, in *Hayburn's Case* (1792), 2 Dall. 409, refused to carry the act into effect.

"In *Emerick v. Harris* (1808), 1 Bin. (Pa.) 416, the right of the courts to pass upon the constitutionality of an act of the Legislature was asserted, though the act in question was held to be constitutional. Mr. Justice Yeates stated that *Marbury v. Madison* was not published until after his opinion had been prepared.

"The constitutionality of statutes had been argued without expressly stating the power of the court to declare them void, if unconstitutional, in several other cases, *e. g.*, *Hilton v. United States* (1796), 3 Dall. (U. S.) 171, where the statute was held constitutional, and *Respublica v. Cobbett* (1798); *Respublica v. Duguet* (1799), and *Respublica v. Franklin* (1802), unreported cases in

the Supreme Court of Pennsylvania, cited by Mr. Justice Yeates in his opinion in *Emerick v. Harris* (1808), 1 Bin. (Pa.) 416, 422." Justice Mitchell, address in Marshall Memorial, I, 482, 483, note.

See also McMaster, *Hist. of the People of U. S.*, I, 337, 338, V, 397 *et seq.*; Story, *Com.*, I, ch. VI, § 486, note.

See especially Thayer's *Cases on Constitutional Law*, with notes, Volume I, pages 48-107, where the earlier cases on the subject of the power of the courts to declare statutes contrary to the Constitution to be void are given, with instructive and valuable notes by the learned editor. See, also, Dillon's *Laws and Jurisprudence of England and America*, pages 199, 200, 227, note.

On Marshall Day, 1901, Marbury's case was more frequently referred to by the speakers than any other of Marshall's great decisions.

REFERENCES TO MARBURY v. MADISON IN MARSHALL MEMORIAL.

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Introduction by Hon. John F. Dillon, pp. xviii, xxi, xxii, xxv *et seq.*, xlii; Justice Horace Gray, pp. 66, 98; Hon. Wm. L. Putnam, pp. 103, 104; Hon. Charles Freeman Libby, pp. 119, 120; Prof. Jeremiah Smith, pp. 141 *et seq.*; Prof. James Bradley Thayer, pp. 229 *et seq.*, 234, 235; Judge Le Baron Colt, pp. 295, 296, 304; Charles E. Perkins, pp. 321, 322; Chief Judge A. B. Parker, pp. 342, 343; Hon. John F. Dillon, pp. 358 *et seq.*; Judge Francis M. Finch, pp. 394 *et seq.*; Hon. W. Bourke Cockran, pp. 413, 416; Justice James T. Mitchell, pp. 481, 482, 483; Hon. John Bassett Moore, p. 517.

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Further references to *Marbury's* case, see Miller, Const. of U. S. 384-387; Kent, Com. (12th ed.) 288*a*, 322, 453, 454; Cooley, Const. Lim. 46 and note 1; Thorpe, Const. Hist. of U. S., II, 466-468; John Marshall by Prof. J. B. Thayer, 74-78; John Marshall by Allan B. Magruder, 182-186. This case was fully reviewed in *Kendall v. United States*, 12 Pet. 524; *s. r.*, *United States v. Schurz*, 102 U. S. 378.

**CONGRESS MAY CONSTITUTIONALLY GIVE THE
UNITED STATES A PREFERENCE IN BANK-
RUPTCY OVER OTHER CREDITORS.**

**The United States v. Fisher and Others, Assignees of Blight,
a Bankrupt.**

FEBRUARY TERM, 1805.

[2 Cranch's Reports, 358-405.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

The power to make all laws necessary and proper to carry into execution the powers granted confers on Congress the choice of means and does not confine it to what is indispensably necessary.

The fifth section of the act of the 3d of March, 1797, giving a preference to the United States in cases of insolvency, is not confined to persons accountable for public money, but extends to debtors of the United States generally.

Congress has power to make such a law.

Only one question in this case involved the construction of the Constitution. We give so much of the

opinion of the court¹ as relates to the constitutional question, which was as to the constitutionality of an act of Congress which gave the United States a preference over the other creditors of a bankrupt.

MARSHALL, Chief Justice. To the general observations made on this subject, it will only be observed that as the court can never be unmindful of the solemn duty imposed on the Judicial Department when a claim is supported by an act which conflicts with the Constitution, so the court can never be unmindful of its duty to obey laws which are authorized by that instrument. Opinion.

In the case at bar the preference claimed by the United States is not prohibited, but it has been truly said that under a Constitution conferring specific powers the power contended for must be granted or it cannot be exercised.

It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the government of the United States, or in any department or officer thereof. "Necessary" and
"proper" clause.

In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should

¹ The court was constituted as follows:

JOHN MARSHALL, <i>Chief Justice.</i>		
WILLIAM CUSHING,	}	<i>Associate Justices.</i>
WILLIAM PATERSON,		
BUSHROD WASHINGTON,		
WILLIAM JOHNSON,		

Justice Johnson dissented in this case. The case was argued for the United States by Mr. George M. Dallas, attorney of the United States for the district of Pennsylvania.

Mr. Harper, Mr. Ingersoll, Mr. Lewis and Mr. Lee for the defendants in error.

Construction of the clause. be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power.

Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be obtained by other means. Congress must possess the choice of means and must be empowered to use any means which are in fact conducive to the exercise of a power granted by the Constitution.

The Government is to pay the debt of the Union and must be authorized to use the means which appear to itself most eligible to effect that object. It has, consequently, a right to make remittances by bills, or otherwise, and to take those precautions which will render the transaction safe.

This claim of priority on the part of the United States will, it has been said, interfere with the right of the State sovereignties respecting the dignity of debts, and will defeat the measures they have a right to adopt to secure themselves against delinquencies on the part of their own revenue officers.

But this is an objection to the Constitution itself. The mischief suggested, so far as it can really happen, is the necessary consequence of the supremacy of the laws of the United States on all subjects to which the legislative power of Congress extends.

NOTE.

The action was instituted to try two questions:

1. Whether an attachment laid by the United States on property of the bankrupt in the hands of the collector of Newport, in Rhode Island, after the commission of bankruptcy had issued, is available against the assignees.

2. Whether the United States are entitled to be first paid and satisfied in preference to the private creditors, a debt due to the United States by Peter Blight, as indorser of a foreign bill of exchange, out of the estate of the bankrupt in the hands of the assignee.

The second question brought up for determination the constitutionality of the fifth section of the act of March 3, 1797, which provided:

"That where any revenue officer, or other person hereafter becoming indebted to the United States by bond or otherwise, shall become insolvent, or where the estate of any deceased debtor in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States shall be first satisfied; and the priority hereby established shall be deemed to extend as well to cases in which a debtor, not having sufficient property to pay all his debts, shall make a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed or absent debtor shall be attached by process of law, as to cases in which an act of legal bankruptcy shall be committed."

Mr. Ingersoll, for the defendants, in his argument that the act was unconstitutional, made the following points:

"If liens general or specific, if judgments and mortgages are to be set aside by the prerogative of the United States, it will be to impair the obligation of contracts by an *ex post facto* law. Under what clause of the Constitution is such a power given to Congress? Is it under the general power to make all laws necessary and proper for carrying into execution the particular powers specified? If so, where is the necessity or where the propriety of such a provision, and to the exercise of what other power is it necessary? But it is in direct violation of the Constitution, inasmuch as it deprives the debtor of his trial by jury without his consent."

This case brought up the construction of that clause of the Constitution known as the "necessary and proper" or the "sweeping clause."¹ Both Madison and Hamilton commented upon it, and the latter devoted to it several

¹ Story, Const., I, ch. V, §§ 480, 481 and notes; Cooley, Const. Lim., 63; Tucker, Const. of U. S., I, 367, 369; Thorpe, Const. Hist. of U. S., I, 525; Miller, Const. of U. S., 143, 144.

pages of the Federalist.¹ Marshall had frequent occasion to consider this clause and he applied to it the rules of construction which he uniformly adopted where a liberal construction was vital to the supremacy of the Constitution. Years later in the great case of *McCulloch v. Maryland*, Marshall referring, *inter alia*, to this clause laid down the well known canon:² "Let the end be legitimate; let it be within the scope of the Constitution; and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional."

This construction has ever since been followed, and was notably applied in the *Slaughter-House Cases*³ and the *Legal-Tender Cases*.⁴

In connection with this subject it is not amiss to insert the expressive language of Justice Johnson in delivering the opinion of the court in *Anderson v. Dunn*, 6 Wheaton, 204: "The idea is Utopian that government can exist without leaving the exercise of discretion somewhere. Public security against the abuse of such discretion must rest on responsibility and stated appeals to public approbation. Where all power is derived from the people, and public functionaries at short intervals deposit it at the feet of the people, to be resumed again only at their own wills, individual fears may be alarmed by the monsters of imagination, but individual liberty can be in little danger."⁵

REFERENCES TO UNITED STATES *v.* FISHER *et al.* IN MARSHALL MEMORIAL

Marshall maintained the authority of Congress to make all laws necessary and proper to carry into effect the powers vested by the Constitution in the government of the United States. *Hon. John Bassett Moore*, I, 518.

From 1805 in the case of the United States against Fisher to the last day of his service he (Marshall) never missed an opportunity to

¹ Federalist, No. xxxiii, also Madison, No. xlv.

² Tucker, Const. of U. S., I, 861; Thorpe, Const. Hist. of U. S., II, 487.

³ 16 Wall. 88.

⁴ 12 Wall. 457.

⁵ See also Miller, Const. of U. S., 417, 418.

assert the supremacy of the Federal Government on all matters committed to it by the Constitution as the vital principle of our national existence, nor to show by irresistible logic that to question its sovereignty was to plot its destruction. *W. Bourke Cochran*, I, 412.

In 1805, in the *United States against Fisher*, he (Marshall) found in the clause of the Constitution giving Congress the right to pass all necessary and proper laws for carrying into execution the powers vested in them by the Constitution, authority for a law making the United States a preferred creditor. *Henry Cabot Lodge*, II, 329; *Hon. Henry Hitchcock*, II, 515.

**THE DISTRICT OF COLUMBIA IS NOT A "STATE"
WITHIN THE MEANING OF THE CONSTITUTION.**

Hepburn and Dundas v. Ellzey.

FEBRUARY TERM, 1805.

[2 Cranch's Reports, 445-453.]

The proposition of law decided is thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

The District of Columbia is not "a State" within the meaning of that term as used in the Constitution, and its citizens cannot sue in the courts of the United States as citizens of any State.

Hepburn and Dundas, who were citizens of the District of Columbia, sued Ellzey, who was a citizen of Virginia, in the United States Circuit Court holden in the District of Virginia, and this question arose:

"Are citizens of the District of Columbia citizens of a State within the meaning of the second section of the third article of the Constitution of the United States?"

Is the District of Columbia a "State" within the meaning of art. 3, sec. 2 of the Constitution of U. S.

The judges of the Circuit Court being opposed in opinion upon this question, it was brought before the Supreme Court,¹ the opinion of which was given as follows:

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice*.

WILLIAM CUSHING,

WILLIAM PATERSON,

SAMUEL CHASE,

BUSHROD WASHINGTON, }

Associate Justices.

The case was argued by E. J. Lee for the plaintiffs and by Charles Lee for the defendant.

MARSHALL, Chief Justice. The question in this case is whether the plaintiffs, as residents of the District of Columbia, can maintain an action in the Circuit Court of the United States for the District of Virginia.

Opinion.

This depends on the act of Congress describing the jurisdiction of that court. That act gives jurisdiction to the Circuit Courts in cases between a citizen of the State in which the suit is brought and a citizen of another State. To support the jurisdiction in this case, therefore, it must appear that Columbia is a State.

Under an act of Congress Circuit Court has jurisdiction in cases between a citizen of the State where suit is brought and citizen of another State.

On the part of the plaintiffs it has been urged that Columbia is a distinct political society, and is therefore "a State," according to the definitions of writers on general law.

This is true. But as the act of Congress obviously uses the word "State" in reference to that term as used in the Constitution, it becomes necessary to inquire whether Columbia is a State in the sense of that instrument. The result of that examination is a conviction that the members of the American Confederacy only are the States contemplated in the Constitution.

The House of Representatives is to be composed of members chosen by the people of the several States; and each State shall have at least one representative.

The Senate of the United States shall be composed of two Senators from each State.

Each State shall appoint for the election of the executive a number of electors equal to its whole number of Senators and Representatives.

These clauses show that the word "State" is used in the Constitution as designating a member of the Union, and excludes from the term the signifi-

Certain clauses show that the word "State" is used in the Constitution as designating a member of the Union.

cation attached to it by writers on the laws of nations. When the same term, which has been used plainly in this limited sense, in the articles respecting the Legislative and Executive Departments, is also employed in that which respects the Judicial Department, it must be understood as retaining the sense originally given to it.

Other passages from the Constitution have been cited by the plaintiffs to show that the term "State" is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them.

It is true that, as citizens of the United States, and of that particular district which is subject to the jurisdiction of Congress, it is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every State in the Union, should be closed upon *them*. But this is a question for legislative, not for judicial consideration.

The opinion to be certified to the Circuit Court is, that that court has no jurisdiction in the case.

NOTE.

See Tucker, Const. of U. S., II, 600, 787, 792; Scott v. Jones, 5 How. 343, 377; Thorpe, Const. Hist. of U. S., II, 490; Kent, Com. (12th ed.), I, 349c, 385b.

THE AMERICAN LAW OF TREASON.

The Constitution of the United States, article III, section 3, defines the crime of treason, and what is essential to a conviction thereof, as follows:

“Treason against the United States shall consist only in levying war against them or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason, unless on the testimony of two witnesses to the same overt act, or on confession in open court.”

This important provision was designed to abolish the law of constructive treason as it existed in England. Substantially the same provision has been made in the Constitutions of the several States in defining treason against the States. The construction of the above quoted provision of the Constitution of the United States relating to treason, although questions concerning it had arisen in the inferior courts, first came before the Supreme Court of the United States in the case below given of *Bollman and Swartwout*, arising out of the Burr conspiracy, or enterprise, at the February Term, 1807, and it underwent a further and most deliberate examination in the trial of Burr on the charge of treason, in the case of the *United States v. Burr*, before Marshall, Chief Justice, and Griffin, District Judge of the United States, in the Circuit Court for Virginia in 1807. As these two cases constitute the foundation, in fact almost the body, of the American law of treason, the opinions of

the Chief Justice are given in full in the two cases that follow.¹

The soundness of Marshall's exposition of the law of treason in these two cases, as that offense is defined in the Constitution of the United States, has never been questioned and is unquestionable. That part of the opinion in *Bollman and Swartwout*, that, if war be actually levied, all who are actually leagued in the general conspiracy and who perform any part, however minute, or *however remote from the scene of action*, are traitors, was criticised in the arguments of counsel in the Burr case as giving countenance to the English doctrine of constructive treason. However this may be, the opinion of the Chief Justice in the Burr trial, below given, explains and shows that only those who have done some act or taken part in the accomplishment of the overt act of treason charged in the indictment are guilty of the crime as defined in the Constitution of the United States.²

The opinion of the Chief Justice in the Burr case was delivered after the most exhaustive arguments on the question, commencing on August 21st and ending on Saturday, August 29th, the discussion having been participated in by Mr. Rodney, Mr. MacRae, Mr. Wirt, Mr. Hay, Mr. Wickham, Mr. Botts, Mr. Luther Martin, Mr. Randolph and Mr. Lee. The opinion was delivered on Monday, August 31, 1807.

A more imposing array of counsel, combining legal

¹ Parton in his "Life of Burr," chapters XXI, XXVI; Kennedy in his "Life of Wirt," vol. I, chapters XIII, XIV; Magruder in his "Life of Marshall," chapter XI, and Van Santvoord, "Lives of the Chief Justices of the United States," page 364, give satisfactory accounts of this famous trial, intended mainly for the non-professional reader.

² Van Santvoord, "Lives of the Chief Justices of the United States," pages 366 and 367.

and oratorical ability of the first order, has perhaps never participated in the trial of any cause, civil or criminal, in any court. To the counsel for the defendant must be added Burr himself, who took an active part in the discussion of various questions arising in the case. His consummate skill and ability are shown alike in the line of defense adopted and in his terse, clear and forcible arguments.

The editor takes the liberty of quoting from a note of Judge Dillon to him concerning this opinion, "That nowhere does Marshall's greatness as a judicial magistrate shine with greater lustre than in his rulings and decisions in this famous case. It shows that he was as great in the discussion of cases and authorities as in the discussion and enforcement of legal principles, and his opinion, given immediately after the close of the arguments, with only the intervention of Sunday, is as remarkable in its way as the charge of Chief Justice Cockburn in the Tichborne case, and it conclusively refutes the opinion sometimes hastily expressed that Marshall was not a thorough, trained and consummate lawyer in the technical learning of the law."

Ex parte Bollman and Swartwout.

FEBRUARY TERM, 1807.

[4 Cranch's Reports, 75-137.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

If an offense be committed on land, the offender must be tried by the court having jurisdiction over that territory where the offense was committed.

Under the fourteenth section of the Judiciary Act, this court has power to issue a writ of *habeas corpus* to examine into the cause of a commitment by the Circuit Court for the District of Columbia.

It is the revision of a decision of an inferior court, confining a person for trial, and therefore is the exercise of appellate jurisdiction.

To constitute treason war must be actually levied.

A conspiracy to subvert the government by force is not treason.

If a body of men be actually assembled for the purpose of effecting by force a treasonable design, all who perform any part, however minute, and however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors.

The mere enlistment of men, who are not assembled, is not a levying of war.

An affidavit made before one magistrate may justify a commitment by another.

Facts in the case.

Erick Bollman and Samuel Swartwout, being implicated with Burr in a treasonable conspiracy against the United States, by affidavits of General Wilkinson and others, were committed to prison by the Circuit Court for the District of Columbia.

Charles Lee and R. G. Harper moved the Supreme Court of the United States for a writ of *habeas corpus*¹ directed to the Marshal of the District of Columbia, ordering him to bring Swartwout and Bollman before the

¹ The office of this writ is to bring any person in confinement before the proper court, and calls upon the one who holds the person in durance to show the ground whereon he does so. To move the court for a rule or writ is merely to ask for it.

Supreme Court, that the cause of their commitment might be inquired into.

The first question was whether the Supreme Court had the power to grant a writ of *habeas corpus* in such a case. The court decided that it had such power, Justice Johnson dissenting.

On the other question involved the majority of the court held that there was not sufficient evidence of a levying of war against the United States to justify the commitment of Swartwout on the charge of treason, and against Bollman there was still less testimony.

The court further stated there was no doubt that both the prisoners were engaged in a most culpable enterprise against the dominions of a power at peace with the United States, and guilty, therefore, of a high misdemeanor, but no part of this crime having been committed in the District of Columbia the unanimous opinion of the court was that they could not be tried in that district.

The Chief Justice in the opinion which he gave goes at length into the question of treason, defining it, and showing what is necessary to constitute that crime, and he also minutely examines and discusses what is necessary to complete the crime of levying war against the United States.

The following is the opinion of the court:¹ . . . Opinion.

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

WILLIAM CUSHING,

SAMUEL CHASE,

BUSHROD WASHINGTON.

WILLIAM JOHNSON,

BROCKHOLST LIVINGSTON,

} *Associate Justices.*

Justices Cushing and Chase were absent on account of ill health. Charles Lee and R. G. Harper appeared for Bollman and Swartwout, respectively, and F. S. Key and Luther Martin were associated with them. C. A. Rodney, Attorney-General, and Walter Jones, Attorney for the District of Columbia, on behalf of the prosecution.

MARSHALL, Chief Justice. As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the Constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar in relation to it may be answered by the single observation, that for the meaning of the term *habeas corpus* resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States must be given by written law.

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves and their members from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.

To enable the court to decide on such question, the power to determine it must be given by written law.

The inquiry, therefore, on this motion will be, whether by any statute, compatible with the Constitution of the United States, the power to award a writ of *habeas corpus*, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

Power to issue *habeas corpus* must be given by statute.

The fourteenth section of the judicial act (Laws U. S., vol. I, p. 58) has been considered as containing a substantive grant of this power.

It is in these words: "That all the before mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.¹ And that either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment. *Provided*, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some cause which they are capable of finally deciding.

It has been urged that, in strict grammatical construction, these words refer to the last antecedent, which is, "all other writs not specially provided for by statute."

This criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt is, that the true sense of the words is to be determined by the nature of the provision, and by the context.

¹ Kent, Com. (12th ed.), I, 300, *d.* 301 and note 1; Cooley, Const. Lim. 47 and note 2.

It may be worthy of remark that this act was passed by the first Congress of the United States, sitting under a Constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."

Acting under the immediate influence of this injunction they must have felt with peculiar force the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation they give to all the courts the power of awarding writs of *habeas corpus*.

Habeas corpus
a generic term. It has been truly said that this is a generic term, and includes every species of that writ. To this it may be added that, when used singly,—when we say the writ of *habeas corpus*, without addition,—we most generally mean that great writ which is now applied for; and in that sense it is used in the Constitution.

The section proceeds to say that "either of the justices of the Supreme Court, as well as judges of the District Courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment."

It has been argued that Congress could never intend to give a power of this kind to one of the judges of this court which is refused to all of them when assembled.

There is certainly much force in this argument, and it receives additional strength from the consideration that if the power be denied to this court it is denied to every other court of the United States; the right to grant this

important writ is given in this sentence to every judge of the Circuit or District Court, but can neither be exercised by the Circuit nor District Court. It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made and openly discussed, and might yet retire to his chambers and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both that the power of the judge at his chambers should be suspended during his term than that it should be exercised only in secret.

Whatever motives might induce the Legislature to withhold from the *supreme* court the power to award the great writ of *habeas corpus*, there could be none which would induce them to withhold it from *every* court in the United States; and as it is granted to *all* in the *same sentence* and by the *same words*, the sound construction would seem to be that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.

The doubt which has been raised on this subject may be further explained by examining the character of the various writs of *habeas corpus*, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable the court to exercise its jurisdiction in causes which it is enabled to decide finally.

The various writs of *habeas corpus*, as stated and accurately defined by Judge Blackstone (Commentaries, vol. 3, p. 129), are, 1st.

Various writs of *habeas corpus* defined.

The writ of *habeas corpus ad respondendum*, "when a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner and charge him with this new action in the court above."

This case may occur when a party having a right to sue in this court (as a State at the time of the passage of this act, or a foreign minister) wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court of the *United States*, or of a *State* court. If it be in a court of the United States, this writ would be inapplicable, because perfectly useless, and consequently could not be contemplated by the Legislature. It would not be required, in such case, to bring the body of the defendant actually into court, and he would already be in the charge of the person who, under an original writ from this court, would be directed to take him into custody, and would already be confined in the same jail in which he would be confined under the process of this court, if he should be unable to give bail.

If the party should be confined by process from a State court, there are many additional reasons against the use of this writ in such a case.

The State courts are not, in any sense of the word, *inferior* courts, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly prescribed, and is not by *habeas corpus*. They are not inferior courts because they emanate from a different authority, and are the creatures of a distinct government.

2d. The writ of *habeas corpus ad satisfaciendum*, "when a prisoner hath had judgment against him in an

action, and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution."

This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole juridical system forbids it.

3d. *Ad prosequendum, testificandum, deliberandum*, etc., "which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the act of Congress; but the power to bring a person up that he may be tried in the proper jurisdiction is understood to be the very question now before the court.

4th, and last. The common writ *ad faciendum et recipiendum*, "which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the Superior Court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum causa*), to do and receive whatever the King's Court shall consider in that behalf. This writ is grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below."

Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law without the leave of the court?

It would not be difficult to demonstrate that the writ of *habeas corpus cum causa* cannot be the particular writ contemplated by the Legislature in the section under consideration; but it will be sufficient to observe generally, that the same act prescribes a different mode for bringing into the courts of the United States suits brought in a State court against a person having a right to claim the jurisdiction of the courts of the United States. He may, on his first appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the United States.

The only power, then, which on this limited construction would be granted by the section under consideration, would be that of issuing writs of *habeas corpus ad testificandum*. The section itself proves that this was not the intention of the Legislature. It concludes with the following proviso: "That writs of *habeas corpus* shall in no case extend to prisoners in gaol unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by courts:—where the person is necessary to be brought into court to testify. That construction cannot be a fair one which would make the Legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

From this review of the extent of the power of awarding writs of *habeas corpus*, if the section be construed in its restricted sense; from a comparison of the nature of

the writ which the courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power so granted with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the Legislature.

But the thirty-third section throws much light upon this question. It contains these words: "And upon all arrests in criminal cases bail shall be admitted, except where the punishment may be death, in which cases it shall not be admitted *but by the Supreme or a Circuit Court*, or by a justice of the Supreme Court, or a judge of a District Court, who shall exercise their discretion therein, regarding the nature and circumstances of the offense, and of the evidence, and of the usages of law."

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners not committed by itself may award a writ of *habeas corpus* for the exercise of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the fourteenth section.

If, by the sound construction of the act of Congress, the power to award writs of *habeas corpus* in order to examine into the cause of commitment is given to this court, it remains to inquire whether this be a case in which the writ ought to be granted.

The only objection is, that the commitment has been made by a court having power to commit and to bail.

Against this objection the argument from the bar has been so conclusive that nothing can be added to it.

If then this were *res integra*, the court would decide in favor of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart. (United States v. Hamilton, 3 Dallas's Reports, 17.)

Case of United States v. Hamilton expressly in point.

If the act of Congress gives this court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the Constitution.

In the *mandamus* case (*Marbury v. Madison*, 1 Cranch's Reports, 175) it was decided that this court would not exercise original jurisdiction, except so far as that jurisdiction was given by the Constitution. But so far as that case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly *appellate*. It is the revision of a decision of an inferior court, by which a citizen has been committed to jail.

It has been demonstrated at the bar that the question brought forward on a *habeas corpus* is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and therefore these questions are separated, and may be decided in different courts.

Question brought forward on a *habeas corpus* distinct from that involved in the cause.

The decision that the individual shall be imprisoned

must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and therefore appellate in its nature.

But this point also is decided in Hamilton's case, and in Burford's case.¹

If at any time the public safety should require the suspension of the powers vested by this act in the courts of the United States, it is for the Legislature to say so.

That question depends on political considerations, on which the Legislature is to decide. Until the legislative will be expressed this court can only see its duty and must obey the laws.

The motion, therefore, must be granted.

The marshal of the district having, in accordance with the writ of *habeas corpus*, shown the order of the Circuit Court for the committal of the prisoners, Mr. Lee then moved that they should be discharged or admitted to bail; the main grounds for this motion are examined in the opinion of the court, delivered by the Chief Justice in these words:

MARSHALL, Chief Justice. The prisoners having been brought before this court on a writ of *habeas corpus*, and the testimony on which they were committed having been fully examined and attentively considered, the court is now to declare the law upon their case.

This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is whether the accused shall be discharged or held to trial; and if the latter, in what

This is a mere inquiry,
not a prosecution.

¹ At February term, 1806, in this court.

place they are to be tried, and whether they shall be confined or admitted to bail. "If," says a very learned and accurate commentator, "upon this inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or given bail."

The specific charge brought against the prisoners is treason in levying war against the United States.

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands from the tribunal before which it is made a more deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.

To prevent the possibility of those calamities which result from the extension of treason to offenses of minor importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject, both to the legislature and the courts of America, which neither can be permitted to transcend.

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

What constitutes treason defined.

To constitute that specific crime for which the prisoners now before the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to

levy war, and actually to levy war, are distinct offenses. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to serve without the realm, but they were enlisted within it; and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied.

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors.¹ But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war.

Crimes so atrocious as those which have for their object the subversion by violence of those laws and those institutions which have been ordained in order to secure the peace and happiness of society are not to escape punishment because they have not ripened into treason. The wisdom of the Legislature is competent to provide for the case; and the framers of our Constitution, who not only defined and limited the crime, but with jealous

¹ See Von Holst, Constitutional Law of U. S. 155.

circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless

Two witnesses to same overt act or confession in open court necessary to convict of treason.

on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is therefore more safe, as well as more consonant to the principles of our Constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the Legislature in its wisdom may provide.

What necessary to complete the crime of levying war against the United States.

To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New Orleans by force would have been unquestionably a design, which, if carried into execution, would have been treason; and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

In conformity with the principles now laid down have

been the decisions heretofore made by the judges of the United States.

The opinions given by Judge Paterson and Judge Iredell in cases before them imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself. Their opinions, however, contemplate the actual employment of force.

Judge Chase, in the trial of Fries, was more explicit.¹

He stated the opinion of the court to be, "that, if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute

Judge Chase's opinion in trial of Fries distinguishes between crime of conspiring to levy war and crime of treason.

of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the quantum of the force employed neither lessens nor increases the crime; whether by one hundred, or one thousand, persons is wholly immaterial."

"The court are of opinion," continued Judge Chase on that occasion, "that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war."

The application of these general principles to the par-

¹ See *United States v. Burr*, below, as to Fries case.

ticular case before the court will depend on the testimony which has been exhibited against the accused.

The first deposition to be considered is that of General Eaton. This gentleman connects in one statement the purport of numerous conversations held with Colonel Burr throughout the last winter. In the course of these conversations were communicated various criminal projects which seem to have been revolving in the mind of

Gen. Eaton's deposition—Burr's scheme of an expedition against Mexico.

the projector. An expedition against Mexico seems to have been the first and most matured part of his plan, if, indeed, it did not constitute a distinct and separate plan, upon the success of which other schemes still more culpable, but not yet well digested, might depend. Maps and other information preparatory to its execution, and which would rather indicate that it was the immediate object, had been procured, and for a considerable time, in repeated conversations, the whole efforts of Colonel Burr were directed to prove to the witness, who was to have held a high command under him, the practicability of the enterprise, and in explaining to him the means by which it was to be effected.

This deposition exhibits the various schemes of Colonel Burr, and its materiality depends on connecting the prisoners at the bar in such of those schemes as were treasonable. For this purpose the affidavit of General

Affidavit of Gen. Wilkinson objected to as extra-judicial.

Wilkinson, comprehending in its body the substance of a letter from Colonel Burr, has been offered, and was received by the Circuit Court. To the admission of this testimony great and serious objections have been made. It has been urged that it is a voluntary or rather an extra-judicial affidavit, made before a person not appear-

ing to be a magistrate, and contains the substance only of a letter, of which the original is retained by the person who made the affidavit.

The objection that the affidavit is extra-judicial resolves itself into the question whether one magistrate may commit on an affidavit taken before another magistrate. For if he may, an affidavit made as the foundation of a commitment ceases to be extra-judicial, and the person who makes it would be as liable to a prosecution for perjury as if the warrant of commitment had been issued by the magistrate before whom the affidavit was made.

To decide that an affidavit made before one magistrate would not justify a commitment by another might in many cases be productive of great inconvenience, and does not appear susceptible of abuse, if the verity of the certificate be established. Such an affidavit seems admissible on the principle that before the accused is put upon his trial all the proceedings are *ex parte*. The court therefore overrule this objection.

Objection overruled.

That which questions the character of the person who has, on this occasion, administered the oath is next to be considered.

The certificate from the office of the Department of State has been deemed insufficient by the counsel for the prisoners, because the law does not require the appointment of magistrates for the Territory of New Orleans to be certified to that office; because the certificate is in itself informal; and because it does not appear that the magistrate had taken the oath required by the act of Congress.

The first of these objections is not supported by the law of the case; and the second may be so readily cor-

rected that the court has proceeded to consider the subject as if it were corrected, retaining, however, any final decision, if against the prisoners, until the correction shall be made. With regard to the third, the magistrate must be presumed to have taken the requisite oaths, since he is found acting as a magistrate.

On the admissibility of that part of the affidavit which purports to be as near the substance of the letter from Colonel Burr to General Wilkinson as the latter could

Judges divided in opinion concerning admissibility of portion of Burr's letter.

interpret it, a division of opinion has taken place in the court. Two judges are of opinion that, as such testimony delivered in the presence of the prisoner on his trial would be totally inadmissible, neither can it be considered as a foundation for a commitment. Although in making a commitment the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a long and painful imprisonment may be the consequence of his decision. This probable cause, therefore, ought to be proved by testimony in itself legal, and which, though from the nature of the case it must be *ex parte*, ought in most other respects to be such as a court and jury might hear.

Two judges are of opinion that, in this incipient stage of the prosecution, an affidavit stating the general purport of a letter may be read, particularly where the person in possession of it is at too great a distance to admit of its being obtained, and that a commitment may be founded on it.

Under this embarrassment it was deemed necessary to look into the affidavit for the purpose of discovering whether, if admitted, it contains matter which would

justify the commitment of the prisoners at the bar on the charge of treason.

That the letter from Colonel Burr to General Wilkinson relates to a military enterprise meditated by the former has not been questioned. If this enterprise was against Mexico, it would amount to a high misdemeanor; if against any of the Territories of the United States, or if in its progress the subversion of the Government of the United States in any of their territories was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the assemblage of a body of men to effect it would be levying war against the United States.

If expedition directed against Mexico it is a high misdemeanor, if against the U. S. it is treason.

The letter is in language which furnishes no distinct view of the design of the writer. The co-operation, however, which is stated to have been secured, points strongly to some expedition against the territories of Spain. After making these general statements the writer becomes rather more explicit and says: "Burr's plan of operations is to move down rapidly from the falls on the 15th of November, with the first five hundred or one thousand men in light boats, now constructing for that purpose; to be at Natchez between the 5th and 15th of December, there to meet Wilkinson; then to determine whether it will be expedient in the first instance to seize on, or to pass by, Baton Rouge. The people of the country to which we are going are prepared to receive us. Their agents now with Burr say that if we will protect their religion and will not subject them to a foreign power, in three weeks all will be settled."

Burr's plan of operations.

There is no expression in these sentences which would

justify a suspicion that any territory of the United States was the object of the expedition.

For what purpose seize on Baton Rouge; why engage Spain against this enterprise if it was designed against the United States?

“The people of the country to which we are going are prepared to receive us.” This language is peculiarly appropriate to a foreign country. It will not be contended that the terms would be inapplicable to a Territory of the United States, but other terms would more aptly convey the idea, and Burr seems to consider himself as giving information of which Wilkinson was not possessed. When it is recollected that he was the governor of a Territory adjoining that which must have been threatened, if a Territory of the United States was threatened, and that he commanded the army a part of which was stationed in that territory, the probability that the information communicated related to a foreign country, it must be admitted, gains strength.

“Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled.”

This is apparently the language of a people who, from the contemplated change in their political situation, feared for their religion, and feared that they would be made the subjects of a foreign power. That the Mexicans should entertain these apprehensions was natural, and would readily be believed. They were, if the representation made of their dispositions be correct, about to place themselves much in the power of men who professed a different faith from theirs, and who, by making them dependent on England or the United States, would subject them to a foreign power.

That the people of New Orleans, as a people, if really engaged in the conspiracy, should feel the same apprehensions, and require assurances on the same points, is by no means so obvious.

There certainly is not in the letter delivered to Gen. Wilkinson, so far as that letter is laid before the court, one

Nothing in letter to Wilkinson to show an enterprise against U. S.

syllable which has a necessary or a natural reference to an enterprise against any territory of the United States.

That the bearer of this letter must be considered as acquainted with its contents is not to be controverted. The letter and his own declarations evince the fact.

After stating himself to have passed through New York and the western States and Territories, without insinuating that he had performed on his route any act whatever which was connected with the enterprise, he states their object to be, "to carry an expedition to the Mexican provinces."

This statement may be considered as explanatory of the letter of Col. Burr, if the expressions of that letter could be thought ambiguous.

But there are other declarations made by Mr. Swartwout, which constitute the difficulty of this case. On an inquiry from General Wilkinson, he said, "this territory would be revolutionized where the people were ready to join them, and that there would be some seizing, he supposed, at New Orleans."

If these words import that the government established by the United States in any of its territories was to be revolutionized by force, although merely as a step to, or a mean of executing, some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war.

But on the import of the words a difference of opinion exists. Some of the judges suppose they refer to the territory against which the expedition was intended; others to that in which the conversation was held. Some consider the words, if even applicable to a territory of the United States, as alluding to a revolution to be effected by the people, rather than by the party conducted by Col. Burr.

But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage of men for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him; and a majority of the court is of opinion that the conversation of Mr. Swartwout affords no sufficient proof of such assembling.

The prisoner stated that "Col. Burr, with the support of a powerful association extending from New York to New Orleans, was levying an armed body of seven thousand men from the State of New York and the western States and Territories, with a view to carry an expedition to the Mexican Territories."

That the association, whatever may be its purpose, is not treason has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. The question, then, is, whether this evidence proves Col. Burr to have advanced so far in levying an army as actually to have assembled them.

It is argued that, since it cannot be necessary that the whole seven thousand men should have assembled,

their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime.

This position is correct, with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary that there should be an actual assemblage, and therefore the evidence should make the fact unequivocal.

The traveling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an equivocal act and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.

The particular words used by Mr. Swartwout are that Col. Burr "was levying an armed body of seven thousand men." If the term "*levying*" in this place imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war.

It is thought sufficiently apparent that the latter is the sense in which the term was used. The fact alluded to, if taken in the former sense, is of a nature so to force itself upon the public view, that, if the army had then actually assembled, either together or in detachments, some evidence of such assembling would have been laid before the court.

The words used by the prisoner in reference to seizing at New Orleans, and borrowing, perhaps, by force, from the bank, though indicating a design to rob, and conse-

quently importing a high offense, do not designate the specific crime of levying war against the United States.

It is therefore the opinion of a majority of the court that in the case of Samuel Swartwout there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason.

Not sufficient evidence to commit either Bollman or Swartwout on charge of treason.

Against Erick Bollman there is still less testimony. Nothing has been said by him to support the charge that the enterprise in which he was engaged had any other object than was stated in the letter of Colonel Burr. Against him, therefore, there is no evidence to support a charge of treason.

That both of the prisoners were engaged in a most culpable enterprise against the dominions of a power at peace with the United States, those who admit the affidavit of General Wilkinson cannot doubt. But that no part of this crime was committed in the District of Columbia is apparent. It is therefore the unanimous opinion of the court that they cannot be tried in this District.

The law read on the part of the prosecution is understood to apply only to offenses committed on the high seas, or in any river, haven, basin, or bay, not within the jurisdiction of any particular State. In those cases there is no court which has particular cognizance of the crime, and therefore the place in which the criminal shall be apprehended, or, if he be apprehended where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offense was committed.

But in this case a tribunal for the trial of the offense, wherever it may have been committed, had been provided by Congress; and at the place where the prisoners were

seized by the authority of the commander-in-chief, there existed such a tribunal. It would, too, be extremely dangerous to say that, because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the General might select, and to which he might direct them to be carried.

The act of Congress which the prisoners are supposed to have violated describes as offenders those who begin, or set on foot, or provide, or prepare, the means for any military expedition or enterprise to be carried on from thence against the dominions of a foreign prince or state with whom the United States are at peace.

There is a want of precision in the description of the offense which might produce some difficulty in deciding what cases would come within it. But several other questions arise which a court consisting of four judges finds itself unable to decide, and therefore, as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged. This is done with the less reluctance because the discharge does not acquit them from the offense which there is probable cause for supposing they have committed; and if those whose duty it is to protect the nation, by prosecuting offenders against the laws, shall suppose those who have been charged with treason to be proper objects for punishment, they will, when possessed of less exceptionable testimony, and when able to say at what place the offense has been committed, institute fresh proceedings against them.

NOTE.

It was earnestly urged on the part of the United States in the Burr trial that the decision in the prior

case of Bollman and Swartwout in respect to treason was extra-judicial and delivered on a point not argued. (See the opinion of Marshall in the *United States v. Burr*, *infra*.) The foregoing opinion was the subject of much discussion by counsel in the subsequent trial of Burr for treason at Richmond, Virginia, in 1807, and Chief Justice Marshall made an interesting explanation as to the reason why the opinion in Bollman and Swartwout took the shape it did. (See references to Marshall Memorial at end of this note.) Wilson's Works, II, 416 *et seq.*, and note on Treason, 422; Tucker on Const., II, 619, 621, 647; Thorpe, Const. Hist. of the U. S., I, 527, 528.

"Bollman after turning State's evidence and refusing a pardon vainly attempted to practise medicine in New Orleans, but soon followed Burr to England. Returning to the United States in the midst of the banking excitement, he rose into temporary notice as the author of 'Paragraphs on Banks;' and then again went back to London. Swartwout lived to become collector of the port of New York, and to rob the Treasury of the United States of more than a million dollars." McMaster, Hist. of People of U. S., III, 87, 88.

The decision of the Supreme Court in the case of Bollman and Swartwout in respect to treason was claimed by counsel for the United States to be "contrary to law and not obligatory because it was extra-judicial and was delivered on a point not argued." Referring to this contention Marshall says: "It is true that in that case, after forming the opinion that no treason could be committed because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered that the judges might act separately, and perhaps at the same time, on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur and which were in some degree connected with the point before them." See also Dillon, Introduction to Marshall Memorial, I, xxix, xxx.

In the cases of Bollman and Swartwout in the Supreme Court, and in the trial of Aaron Burr in this [Virginia] Circuit, he sets bounds to the doctrine of constructive treasons. *Hon. Horace Gray*, Marshall Memorial, I, 71.

He defined the law of treason. *Hon. John Bassett Moore*, *Ib.*, I, 517, 518.

Ex parte Bollman and Swartwout and the United States v. Burr, wherein he gave the definition of treason in the sense of the Constitution. *Charles J. Bonaparte, Esq.*, *Ib.*, II, 16.

Numerous propositions of importance were decided in this case. *Chief Justice John A. Shauck*, *Ib.*, II, 228.

United States v. Aaron Burr.

U. S. Circuit Court, District of Virginia, Summer Term, 1807.

[4 Cranch's Reports, Appendix, 470-507.]

In connection with this case of Bollman and Swartwout we give the following opinion of Chief Justice Marshall, as delivered at the trial of Aaron Burr, before the United States Circuit Court for the district of Virginia, on the 31st of August, 1807.

Certain acts which were supposed to amount to treason having been proved, evidence was offered for the purpose of connecting Colonel Burr with those who committed these acts, he having been at a great distance from the scene of action, in another Federal District and State; this evidence was objected to as irrelevant, and upon the question of its admission the Chief Justice gave the opinion of the court¹ on August 31, 1807, as follows:

Opinion. MARSHALL, Chief Justice. The question now to be decided has been argued in a manner worthy of its importance, and with an earnestness evincing the

¹ The court was constituted as follows: JOHN MARSHALL, Chief Justice; CYRUS GRIFFIN, District Judge.

This opinion here printed closes the second volume of the Washington edition of the shorthand report of David Robertson of Burr's trial, 1808, and is at page 401 of the second volume of the Philadelphia edition of 1808. It is also contained in the Appendix to 4 Cranch's Reports, which is the copy here followed. Judge Cyrus Griffin, District Judge, sat with Chief Justice Marshall on the trial.

strong conviction felt by the counsel on each side that the law is with them.¹

A degree of eloquence seldom displayed on any occasion has embellished a solidity of argument and a depth of research by which the court has been greatly aided in forming the opinion it is about to deliver.

The testimony adduced on the part of the United States to prove the overt act laid in the indictment having shown, and the attorney for the United States having admitted, that the prisoner was not present when the act, whatever may be its character, was committed, and there being no reason to doubt but that he was at a great distance, and in a different State, it is objected to the testimony offered on the part of the United States, to connect him with those who committed the overt act, that such testimony is totally irrelevant, and must therefore be rejected.

Burr not present when overt act committed.

The arguments in support of this motion respect in part the merits of the case as it may be supposed to stand independent of the pleadings, and in part as exhibited by the pleadings.

The merits of the case independent of the pleadings.

On the first division of the subject two points are made.

1st. That, conformably to the Constitution of the United States, no man can be convicted of treason who was not present when the war was levied.

2d. That, if this construction be erroneous, no testimony can be received to charge one man with the overt

¹ Counsel for the United States: Cæsar A. Rodney, Attorney General; George Hay, District Attorney for the district of Virginia; Alexander MacRae, William Wirt.

Counsel for Burr: Edmund Randolph, John Wickham, Luther Martin, Benjamin Botts, Charles Lea.

acts of others, until those overt acts, as laid in the indictment, be proved to the satisfaction of the court.

The question which arises on the construction of the Constitution, in every point of view in which it can be contemplated, is of infinite moment to the people of this country and to their government, and requires the most temperate and the most deliberate consideration.

"Treason against the United States shall consist only in levying war against them."

What is the natural import of the words "levying war?"

Treason against the
U. S. consists only in
"levying war."

And who may be said to levy it? Had their first application to treason been made by our Constitution, they would certainly have admitted of some latitude of construction. Taken most literally, they are, perhaps, of the same import with the words raising or creating war; but as those who join after the commencement are equally the objects of punishment, there would probably be a general admission that the term also comprehended making war, or carrying on war. In the construction which courts would be required to give these words, it is not improbable that those who should raise, create, make, or carry on war, might be comprehended. The various acts which would be considered as coming within the term would be settled by a course of decisions, and it would be affirming boldly to say that those only who actually constituted a portion of the military force appearing in arms could be considered as levying war. There is no difficulty in affirming that there must be a war, or the crime of levying it cannot exist; but there would often be considerable difficulty in affirming that a particular act did or did not involve the person committing it in the guilt and in the fact of levying war. If, for example, an army should be

actually raised for the avowed purpose of carrying on open war against the United States and subverting their government, the point must be weighed very deliberately before a judge would venture to decide that an overt act of levying war had not been committed by a commissary of purchases who never saw the army, but who, knowing its object, and leaguering himself with the rebels, supplied that army with provisions, or by a recruiting officer holding a commission in the rebel service, who, though never in camp, executed the particular duty assigned to him.

But the term is not for the first time applied to treason by the Constitution of the United States. It is a technical

Term "levying war" not for first time applied to treason by the Constitution.

term. It is used in a very old statute of that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is therefore reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term "levying war" is used in that instrument in the same sense in which it was understood in England and in this country to have been used in the statute of the twenty-fifth of Edward III., from which it was borrowed.

Term "levying war" to be understood in same sense as in 25 Edw. III.

It is said that this meaning is to be collected only from adjudged cases. But this position cannot be conceded to the extent in which it is laid down. The superior au-

thority of adjudged cases will never be controverted. But those celebrated elementary writers who have stated the principles of the law, whose statements have received the common approbation of legal men, are not to be disregarded. Principles laid down by such writers as Coke, Hale, Foster, and Blackstone are not lightly to be rejected. These books are in the hands of every student. Legal opinions are formed upon them, and those opinions are afterwards carried to the bar, the bench, and the legislature. In the exposition of terms, therefore, used in instruments of the present day, the definitions and the dicta of those authors, if not contradicted by adjudications, and if compatible with the words of the statute, are entitled to respect. It is to be regretted that they do not shed as much light on this part of the subject as is to be wished.

Coke does not give a complete definition of the term, but puts cases which amount to levying war. "An actual rebellion or insurrection," he says, "is a levying of war." In whom? Coke does not say whether in those only who appear in arms, or in all those who take part in the rebellion or insurrection by real open deed.

Hale, in treating on the same subject, puts many cases which shall constitute a levying of war, without which no act can amount to treason; but he does not particularize the parts to be performed by the different persons concerned in that war which shall be sufficient to fix on each the guilt of levying it.

Foster says: "The joining with rebels in an act of rebellion, or with enemies in acts of hostility, will make a man a traitor."

Coke's definition incomplete.

Hale is also not definite.

Foster's definition of levying war.

"Furnishing rebels or enemies with money, arms, ammunition, or other necessities will *prima facie* make a man a traitor."

Foster does not say that he would be a traitor under the words of the statute, independent of the legal rule which attaches the guilt of the principal to an accessory, nor that his treason is occasioned by that rule. In England this discrimination need not be made except for the purpose of framing the indictment, and therefore in the English books we do not perceive any effort to make it. Thus, surrendering a castle to rebels, being in confederacy with them, is said by Hale and Foster to be treason under the clause of levying war; but whether it be levying war in fact or aiding those who levy it, is not said.

Upon this point Blackstone is not more satisfactory. Although we may find among the commentators upon treason

Blackstone also unsatisfactory on this subject.

enough to satisfy the inquiry, What is a state of internal war? yet no precise information can be acquired from them which would enable us to decide with clearness whether persons not in arms, but taking part in a rebellion, could be said to levy war, independent of that doctrine which attaches to the accessory the guilt of his principal.

If in adjudged cases this question has been taken up and directly decided, the court has not seen those cases. The arguments which may be drawn from the form of the indictment, though strong, are not conclusive. In the precedent found in Tremaine, Mary Speake, who was indicted for furnish-

Case of Mary Speake in England.

ing provisions to the party of the Duke of Monmouth, is indicted for furnishing provisions to those who were levying war, not for levying war herself. It may cor-

rectly be argued that, had this act amounted to levying war, she would have been indicted for levying war, and the furnishing of provisions would have been laid as the overt act. The court felt this when the precedent was produced. But the argument, though strong, is not conclusive, because in England the inquiry whether she had become a traitor by levying war, or by giving aid and comfort to those who were levying war, was unimportant, and because, too, it does not appear from the indictment that she was actually concerned in the rebellion, that she belonged to the rebel party, or was guilty of anything further than a criminal speculation in selling them provisions.

It is not deemed necessary to trace the doctrine, that in treason all are principals, to its source. Its origin is most probably stated correctly by Judge Tucker, in a work the merit of which is with pleasure acknowledged. But if a spurious doctrine has been introduced into the common law, and has for centuries been admitted as genuine, it would require great hardihood in a judge to reject it. Accordingly, we find those of the English jurists who seem to disapprove the principle declaring that it is now too firmly settled to be shaken.

It is unnecessary to trace this doctrine to its source, for another reason. The terms of the Constitution comprise no question respecting principal and accessory, so far as either may be truly and in fact said to levy war. Whether in England a person would be indicted in express terms for levying war, or for assisting others in levying war, yet if, in correct and legal language, he can be said to have levied war, and if it has never been decided that the act would not amount to levying war,

Doctrine that in treason all are principals: Judge Tucker's statement of its origin.

his case may, without violent construction, be brought within the letter and the plain meaning of the Constitution.

In examining these words, the argument which may be drawn from felonies, as, for example, from murder, is not more conclusive.

Argument drawn from felonies inconclusive.

Murder is the single act of killing with malice aforethought. But war is a complex operation composed of many parts co-operating with each other. No one man, or body of men, can perform them all, if the war be of any continuance. Although, then, in correct and in law-language, he alone is said to have murdered another who has perpetrated the fact of killing, or has been present aiding that fact, it does not follow that he alone can have levied war who has borne arms. All those who perform the various and essential military parts of prosecuting the war, which must be assigned to different persons, may with correctness and accuracy be said to levy war.

Taking this view of the subject, it appears to the court that those who perform a part in the prosecution of the war may correctly be said to levy war, and to commit treason under the Constitution. It will be observed that this opinion does not extend to the case of a person who performs no act in the prosecution of the war, who counsels and advises it, or who, being engaged in the conspiracy, fails to perform his part. Whether such persons may be implicated by the doctrine that whatever would make a man an accessory in felony makes him a principal in treason, or are excluded, because that doctrine is inapplicable to the United States,—the Constitution having declared that treason shall consist only in

Whether doctrine of principal and accessory applicable in treason.

levying war, and having made the proof of *overt acts* necessary to conviction,—is a question of vast importance, which it would be proper for the Supreme Court to take a fit occasion to decide, but which an inferior tribunal would not willingly determine, unless the case before them should require it.

It may now be proper to notice the opinion of the Supreme Court in the case of the United States against Bollman and Swartwout. It is said that this opinion, in declaring that those who do not bear arms may yet be guilty of treason, is contrary to law, and is not obligatory, because it is extra-judicial, and was delivered on a point not argued.¹ This court is therefore required to depart from the principle there laid down.

That portion of opinion in Bollman and Swartwout's Case which defines treason said to be extra-judicial and *obiter*.

It is true that in that case, after forming the opinion that no treason could be committed, because no treasonable assemblage had taken place, the court might have dispensed with proceeding further in the doctrines of treason. But it is to be remembered that the judges might act separately, and perhaps at the same time, on the various prosecutions which might be instituted, and that no appeal lay from their decisions. Opposite judgments on the point would have presented a state of things infinitely to be deplored by all. It was not surprising, then, that they should have made some attempt to settle principles which would probably occur, and which were in some degree connected with the point before them.

Reason for discussing the subject of treason in Bollman and Swartwout's case.

The court had employed some reasoning to show that without the actual embodying of men war could not be

¹ See note to Bollman and Swartwout, *ante*.

levied. It might have been inferred from this that those only who were so embodied could be guilty of treason. Not only to exclude this inference, but also to affirm the contrary, the court proceed to observe, "It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

This court is told that if this opinion be incorrect it ought not to be obeyed, because it was extra-judicial. For myself, I can say that I could not lightly be prevailed on to disobey it, were I even convinced that it was erroneous; but I would certainly use any means which the law placed in my power to carry the question again before the Supreme Court, for reconsideration, in a case in which it would directly occur and be fully argued.

The court which gave this opinion was composed of four judges. At the time I thought them unanimous; but I have since had reason to suspect that one of them, whose opinion is entitled to great respect, and whose indisposition prevented his entering into the discussions on some of those points which were not essential to the decision of the very case under consideration, did not concur in this particular point with his brethren. Had the opinion been unanimous, it would have been given by a majority of the judges. But should the three who were absent concur with that judge who was present, and

Opinion in case of Bollman and Swartwout correct.

who perhaps dissents from what was then the opinion of the court, a majority of the judges may overrule this decision. I should therefore feel no objection, although I then thought, and still think, the opinion perfectly correct, to carry the point, if possible, again before the Supreme Court, if the case should depend upon it.

In saying that I still think the opinion perfectly correct, I do not consider myself as going further than the preceding reasoning goes. Some gentlemen have argued as if the Supreme Court had adopted the whole doctrine of the English books on the subject of accessories to treason. But certainly such is not the fact. Those only

Who are traitors—Definition.

who perform a part, and who are leagued in the conspiracy, are declared to be traitors. To complete the definition both circumstances must concur. They must "perform a part" which will furnish the overt act, and they must be "leagued in the conspiracy." The person who comes within this description, in the opinion of the court, levies war. The present motion, however, does not rest upon this point; for if under this indictment the United States might be let in to prove the part performed by the prisoner, if he did perform any part, the court could not stop the testimony in its present stage.

2d. The second point involves the character of the overt act which has been given in evidence, and calls upon the court to declare whether that act can amount to levying war. Although the court ought now to avoid any analysis of the testimony which has been offered in this case, provided the decision of the motion should not rest upon it, yet many reasons concur in giving peculiar propriety to a delivery, in the course of these trials, of a detailed opin-

Second point involves character of overt act.

ion on the question, what is levying war? As this question has been argued at great length, it may probably save much trouble to the counsel now to give that opinion.

In opening the case it was contended by the attorney for the United States, and has since been maintained on the part of the prosecution, that neither arms, nor the application of force or violence, are indispensably necessary to constitute the fact of levying war. To illustrate these positions several cases have been stated, many of which would clearly amount to treason. In all of them, except that which was probably intended to be this case, and on which no observation will be made, the object of the assemblage was clearly treasonable; its character was unequivocal, and was demonstrated by evidence furnished by the assemblage itself; there was no necessity to rely upon information drawn from extrinsic sources, or, in order to understand the fact, to pursue a course of intricate reasoning and to conjecture motives. A force is supposed to be collected for an avowed treasonable object, in a condition to attempt that object, and to have commenced the attempt by moving towards it. I state these particulars, because, although the cases put may establish the doctrine they are intended to support, may prove that the absence of arms, or the failure to apply force to sensible objects by the actual commission of violence on those objects, may be supplied by other circumstances, yet they also serve to show that the mind requires those circumstances to be satisfied that war is levied.

Their construction of the opinion of the Supreme Court is, I think, thus far correct. It is certainly the opinion which was at the time entertained by myself and

What is "levying war"?

Actual violence not necessary to constitute levying war.

which is still entertained. If a rebel army, avowing its hostility to the sovereign power, should front that of the government, should march and counter-march before it, should manœuvre in its face, and should then disperse from any cause whatever without firing a gun, I confess I could not without some surprise hear gentlemen seriously contend that this could not amount to an act of levying war. A case equally strong may be put with respect to the absence of military weapons. If the party be in a condition to execute the purposed treason without the usual implements of war, I can perceive no reason for requiring those implements in order to constitute the crime.

It is argued that no adjudged case can be produced from the English books where actual violence has not been committed. Suppose this were true. No adjudged case has or, it is believed, can be produced from those books in which it has been laid down that war cannot be levied without the actual application of violence to external objects. The silence of the reporters on this point may be readily accounted for. In cases of actual rebellion against the government the most active and influential leaders are generally most actively engaged in the war, and as the object can never be to extend punishment to extermination, a sufficient number are found among those who have committed actual hostilities to satisfy the avenging arm of justice. In cases of constructive treason, such as pulling down meeting-houses, where the direct and avowed object is not the destruction of the sovereign power, some act of violence might be generally required to give the crime a sufficient degree of malignity to convert it into treason, to render the guilt of any individual unequivocal.

But Vaughan's case is a case where there was no real application of violence, and where the act was adjudged to be treason. Gen-
Vaughan's case cited.
 tlemen argue that Vaughan was only guilty of adhering to the king's enemies, but they have not the authority of the court for so saying. The judges unquestionably treat the cruising of Vaughan as an overt act of levying war.

The opinions of the best elementary writers concur in declaring that, where a body of men are assembled for the purpose of making war against the government, and are in a condition to make that war, the assemblage is an act of levying war. These opinions are contradicted by no adjudged case, and are supported by Vaughan's case. This court is not inclined to controvert them.

Opinions of elementary writers as to what constitutes act of levying war.

But although in this respect the opinion of the Supreme Court has not been misunderstood on the part of the prosecution, that opinion seems not to have been fully adverted to in a very essential point in which it is said to have been misconceived by others.

The opinion, I am informed, has been construed to mean that any assemblage whatever for a treasonable purpose, whether in force, or not in force, whether in a condition to use violence, or not in that condition, is a levying of war. It is this construction, which has not, indeed, been expressly advanced at the bar, but which is said to have been adopted elsewhere, that the court deems it necessary to examine.

Independent of authority, trusting only to the dictates of reason, and expounding terms according to their ordinary signification, we should probably all concur in

There must be the employment of force or the traitor must be in a condition to employ it.

the declaration that war could not be levied without the employment and exhibition of force. War is an appeal from reason to the sword, and he who makes the appeal evidences the fact by the use of the means. His intention to go to war may be proved by words, but the actual going to war is a fact which is to be proved by open deed. The end is to be effected by force; and it would seem that, in cases where no declaration is to be made, the state of actual war could only be created by the employment of force, or being in a condition to employ it.

But the term having been adopted by our Constitution must be understood in that sense in which it was universally received in this country when the Constitution was framed. The sense in which it was received is to be collected from the most approved authorities of that nation from which we have borrowed the term.

How term was understood when Constitution was framed.

Lord Coke says that levying war against the king was treason at the common law. "A compassing or conspiracy to levy war," he adds, "is no treason, for there must be a levying of war in fact." He proceeds to state cases of constructive levying war, where the direct design is not to overturn the government, but to effect some general object by force. The terms he employs in stating these cases are such as indicate an impression on his mind that actual violence is a necessary ingredient in constituting the fact of levying war. He then proceeds to say, "An actual rebellion, or insurrection, is a levying of war within this act." "If any, with strength and weapons, invasive and defensive, doth hold and defend a castle or fort against the king and his power, this is levying of war against the king." These

Coke's opinion: To levy war there must be an assemblage of men in a condition and with an intention to employ force.

cases are put to illustrate what he denominates "a war in fact." It is not easy to conceive "an actual invasion or insurrection" unconnected with force, nor can "a castle or fort be defended with strength and weapons invasive and defensive," without the employment of actual force. It would seem, then, to have been the opinion of Lord Coke that to levy war there must be an assemblage of men in a condition and with an intention to employ force. He certainly puts no case of a different description.

Lord Hale says (149, 6), "What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, though *de facto* they commit the act they intend, that makes

Lord Hale's opinion of what is necessary to constitute levying war.

a levying of war; for then every riot would be treason," etc.; "but it must be such an assembly as carries with it *speciem belli*, the appearance of war, as if they ride or march, *vexillis explicatis*, with colors flying, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced that it may be reasonably concluded they are in a posture of war, which circumstances are so various that it is hard to describe them all particularly."

"Only the general expressions in all indictments of this nature that I have seen are *more guerrino arraiati*, arrayed in a warlike manner."

He afterwards adds, "If there be a war levied as is above declared, namely, an assembly arrayed in warlike manner, and so in the posture of war for any treasonable attempt, it is *bellum levatum, but not percussum*."

It is obvious that Lord Hale supposed an assemblage of men in force, in a military posture, to be necessary to constitute the fact of levying war. The idea he appears to suggest, that the apparatus of war is necessary, has been very justly combated by an able judge who has written a valuable treatise on the subject of treason; but it is not recollected that his position, that the assembly

*Levying war: Cases
put by Hawkins.*

should be in a posture of war for any treasonable attempt, has ever been denied. Hawkins (c. 17, § 23) says, "That not only those who rebel against the king and take up arms to dethrone him, but also, in many other cases, those who in a violent and forcible manner withstand his lawful authority, are said to levy war against him; and therefore those that hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him."

The cases put by Hawkins are all cases of actual force and violence. "Those who rebel against the king and take up arms to dethrone him;" in many other cases, "those who in a violent and forcible manner withstand his lawful authority;" "those that hold a fort or castle against his forces, or keep together armed numbers of men against his express command."

These cases are obviously cases of force and violence.

Hawkins next proceeds to describe cases in which war is understood to be levied under the statute, although it was not directly made against the government. This Lord Hale terms an interpretative or constructive levying of war, and it will be perceived that he puts no case in which actual force is dispensed with.

"Those also," he says, "who make an insurrection in

order to redress a public grievance, whether it be a real or pretended one, and of their own authority attempt *with force* to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that by private authority which he by public justice ought to do, which manifestly tends to a downright rebellion. As where great numbers *by force* attempt to remove certain persons from the king," etc. The cases here put by Hawkins of a constructive levying of war do in terms require force as a constituent part of the description of the offense.

Judge Foster, in his valuable treatise on treason, states the opinion which has been quoted from Lord Hale, and differs from that writer so far as the latter might seem

Judge Foster's views in his treatise on treason.

to require swords, drums, colors, etc., what he terms the pomp and pageantry of war, as essential circumstances to constitute the fact of levying war. In the cases of Damaree and Purchase he says, "The want of those circumstances weighed nothing with the court, although the prisoners' counsel insisted much on that matter." But he adds, "The number of the insurgents supplied the want of military weapons; and they were provided with axes, crows, and other tools of the like nature, proper for the mischief they intended to effect. *Furor arma ministrat.*"

It is apparent that Judge Foster here alludes to an assemblage in force, or, as Lord Hale terms it, "in a war-like posture," that is, in a condition to attempt or proceed upon the treason which had been contemplated. The same author afterwards states at large the cases of Damaree and Purchase, from 8th State Trials, and they

are cases where the insurgents not only assembled in force, in the posture of war, or in a condition to execute the treasonable design, but they did actually carry it into execution, and did resist the guards who were sent to disperse them.

Judge Foster states (§ 4) all insurrections to effect certain innovations of a public and general concern *by an armed force* to be, in construction of law, high treason within the clause of levying war.

The cases put by Foster of constructive levying of war all contain, as a material ingredient, the actual employment of force. After going through this branch of his subject, he proceeds to state the law in a case of actual levying of war, that is, where the war is intended directly against the government.

He says (§ 9), "An assembly armed and arrayed in a warlike manner for a treasonable purpose is *bellum* Judge Foster's views. *levatum*, though not *bellum percutsum*. Listing and marching are sufficient overt acts without coming to a battle or action. So cruising on the king's subjects under a French commission, France being then at war with us, was held to be adhering to the king's enemies, though no other act of hostility be proved."

"An assembly armed and arrayed in a warlike manner for any treasonable purpose" is certainly in a state of force; in a condition to execute the treason for which they assembled. The words "enlisting and marching," which are overt acts of levying war, do, in the arrangement of the sentence, also imply a state of force, though that state is not expressed in terms; for the succeeding words, which state a particular event as not having happened, prove that event to have been the next circumstance to those which had happened; they are, "without

coming to a battle or action." "If men be enlisted and march" (that is, if they march prepared for battle, or in a condition for action, for marching is a technical term applied to the movement of a military corps), it is an overt act of levying war, though they do not come to a battle or action. This exposition is rendered the stronger by what seems to be put in the same sentence as a parallel case with respect to adhering to an enemy. It is cruising under a commission from an enemy, without committing any other act of hostility. Cruising is the act of sailing in warlike form, and in a condition to assail those of whom the cruiser is in quest.

This exposition, which seems to be that intended by Judge Foster, is rendered the more certain by a reference to the case in the State Trials from which the extracts are taken. The words used by the Chief Justice are, "When men form themselves into a body, and march rank and file with weapons offensive and defensive, this is levying of war with open force, if the design be public." Mr. Phipps, the counsel for the prisoner, afterwards observed, "Intending to levy war is not treason, unless a war be actually levied." To this the Chief Justice answered, "Is it not actually levying of war, if they actually provide arms and levy men, and in a warlike manner set out and cruise, and come with a design to destroy our ships?" Mr. Phipps still insisted, "It would not be an actual levying of war unless they committed some act of hostility." "Yes, indeed," said the Chief Justice, "the going on board, and being in a posture to attack the king's ships." Mr. Baron Powis added, "But for you to say that because they did not actually fight it is not a levying of war, is it not plain what they did in-

Case from the State Trials cited: Actual force not necessary to constitute levying war.

tend? That they came with that intention, that they came in that posture, that they came armed, and had guns and blunderbusses, and surrounded the ship twice; they came with an armed force, that is a strong evidence of the design."

The point insisted on by counsel in the case of Vaughan, as in this case, was, that war could But a warlike posture indispensable. not be levied without actual fighting. In this the counsel was very properly overruled; but it is apparent that the judges proceeded entirely on the idea that a warlike posture was indispensable to the fact of levying war.

Judge Foster proceeds to give other instances of levying war. "Attacking the king's forces in opposition to his authority, upon a march, or in quarters, is levying war." "Holding a castle or fort against the king or his forces, if *actual force be used in order to keep possession*, is levying war. But a bare detainer, as suppose by shutting the gates against the king or his forces, without any other force from within, Lord Hale conceiveth will not amount to treason."

The whole doctrine of Judge Foster on this subject seems to demonstrate a clear opinion that a state of force and violence, a posture of war, must exist, to constitute technically, as well as really, the fact of levying war.

Blackstone's opinion. Judge Blackstone seems to concur with his predecessors. Speaking of levying war he says: "This may be done by taking arms not only to dethrone the king, but under pretense to reform religion, or the laws, or to remove evil counsellors, or other grievances whether real or pretended. For the law does not, neither can it, permit any private man or

set of men to interfere forcibly in matters of such high importance."

He proceeds to give examples of levying war which show that he contemplated actual force as a necessary ingredient in the composition of this crime.

It would seem, then, from the English authorities, that the words "levying war" have not received a technical, different from their natural meaning, so far as respects the character of the assemblage of men which may constitute the fact. It must be a warlike assemblage carrying the appearance of force, and in a situation to practice hostility.

Several judges of the United States have given opinions at their circuits on this subject, all of which deserve and will receive the particular attention of this court.

Opinions of United States judges at their circuits concerning levying war.

In his charge to the grand jury, when John Fries was indicted in consequence of a forcible opposition to the direct tax, Judge Iredell is understood to have said, "I think I am warranted in saying that if, in the case of the insurgents who may come under your consideration, the intention was to prevent by force of arms the execution of any act of the Congress of the United States altogether, any *forcible opposition* calculated to carry that intention into effect was a levying of war against the United States, and of course an act of treason." To levy war, then, according to this opinion of Judge Iredell, required the actual exertion of force.

Judge Iredell's opinion.

Judge Paterson, in his opinions delivered in two different cases, seems not to differ from Judge Iredell. He does not indeed precisely state the employment of force as necessary to

Judge Paterson's opinion.

constitute a levying of war, but in giving his opinion in cases in which force was actually employed, he considers the crime in one case as dependent on the intention, and in the other case he says, "Combining these facts with this design" (that is, combining actual force with a treasonable design), "the crime is high treason."

Judge Peters has also indicated the opinion that force was necessary to constitute the crime of levying war.

Judge Chase has been particularly clear and explicit. In an opinion which he appears to have prepared on great consideration he says: "The court are of opinion, if a body of people conspire and meditate an insurrection to resist or oppose the execution of a statute of the United States by force, that they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the quantum of the force employed neither increases nor diminishes the crime; whether by one hundred or one thousand persons is wholly immaterial.

"The court are of opinion that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but that it is altogether immaterial whether the force used be sufficient to effectuate the object. Any force connected with the intention will constitute the crime of levying of war."

In various parts of the opinion delivered by Judge Chase, in the case of Fries, the same sentiments are to

be found. It is to be observed that these judges are not content that troops should be assembled in a condition to employ force. According to them some degree of force must have been actually employed.

The judges of the United States, then, so far as their opinions have been quoted, seem to have required still more to constitute the fact of levying war than has been required by the English books. Our judges seem to have required the actual exercise of force, the actual employment of some degree of violence. This, however, may be, and probably is, because in the cases in which their opinions were given the design not having been to overturn the government, but to resist the execution of a law, such an assemblage would be sufficient for the purpose, as to require the actual employment of force to render the object unequivocal.

But it is said all these authorities have been overruled by the decision of the Supreme Court in the case of the United States against Swartwout and Bollman.

If the Supreme Court have, indeed, extended the doctrine of treason further than it has heretofore been carried by the judges of England or of this country, their decision would be submitted to. At least

No intention in decision in case of Swartwout and Bollman to depart from the precedents in cases of treason by levying war.

this court could go no further than to endeavor again to bring the point directly before them. It would, however, be expected that an opinion which is to overrule all former precedents, and to establish a principle never before recognized, should be expressed in plain and explicit terms. A mere implication ought not to prostrate a principle which seems to have been so well established. Had the intention been entertained to make so material a change in this respect, the court ought to have ex-

pressly declared that any assemblage of men whatever who had formed a treasonable design, whether in force or not, whether in a condition to attempt the design or not, whether attended with warlike appearances or not, constitutes the fact of levying war. Yet no declaration to this amount is made. Not an expression of the kind is to be found in the opinion of the Supreme Court. The foundation on which this argument rests is the omission of the court to state that the assemblage which constitutes the fact of levying war ought to be in force, and some passages which show that the question respecting the nature of the assemblage was not in the mind of the court when the opinion was drawn, which passages are mingled with others which at least show that there was no intention to depart from the course of the precedents in cases of treason by levying war.

Every opinion, to be correctly understood, ought to be considered with a view to the case in which it was delivered. In the case of the United States against Bollman and Swartwout, there was no evidence that even two men had ever met for the purpose of executing the plan in which those persons were charged with having participated. It was therefore sufficient for the court to say that unless men were assembled war could not be levied. That case was decided by this declaration. The court might, indeed, have defined the species of assemblage which would amount to levying of war; but as this opinion was not a treatise on treason, but a decision of a particular case, expressions of doubtful import should be construed in reference to the case itself; and the mere omission to state that a particular circumstance was necessary to the consummation of the crime ought not

Bollman and Swartwout's case distinguishable from present case.

to be construed into a declaration that the circumstance was unimportant. General expressions ought not to be considered as overruling settled principles without a direct declaration to that effect. After these preliminary observations the court will proceed to examine the opinion which has occasioned them.

The first expression in it bearing on the present question is, "To constitute that specific crime for which the prisoners now before the court have been committed, war must

Opinion in Bollman and Swartwout's case critically examined.

be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offenses. The first must be brought into operation by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed."

Although it is not expressly stated that the assemblage of men, for the purpose of carrying into operation the treasonable intent which will amount to levying war, must be an assemblage in force, yet it is fairly to be inferred from the context, and nothing like dispensing with force appears in this paragraph. The expressions are, "To constitute the crime, war must be actually levied." A conspiracy to levy war is spoken of as "a conspiracy to subvert by force the government of our country." Speaking in general terms of an assemblage of men for this or for any other purpose, a person would naturally be understood as speaking of an assemblage in some degree adapted to the purpose. An assemblage to subvert by force the government of our country, and amounting to a levying of war, should be an assemblage in force.

In a subsequent paragraph the court says, "It is not the intention of the court to say that no individual can *idem.* be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled in order to effect by force a treasonable purpose, all those who perform any part, however minute, etc., and who are actually leagued in the general conspiracy, are traitors. But there must be an actual assembling of men for the treasonable purpose to constitute a levying of war."

The observations made on the preceding paragraph apply to this. "A body of men actually assembled, in order to effect, by force, a treasonable purpose," must be a body assembled with such appearance of force as would warrant the opinion that they were assembled for the particular purpose; an assemblage to constitute an actual levying of war should be an assemblage with such appearance of force as would justify the opinion that they met for the purpose.

This explanation, which is believed to be the natural, certainly not a strained explanation of the words, derives *idem.* some additional aid from the terms in which the paragraph last quoted commences: "It is not the intention of the court to say that no individual can be guilty of treason who has not appeared in arms against his country." These words seem to obviate an inference which might otherwise have been drawn from the preceding paragraph. They indicate that in the mind of the court the assemblage stated in that paragraph was an assemblage in arms; that the individuals who composed it had appeared in arms against their country; that is, in other words, that the assemblage was a military, a war-like assemblage.

The succeeding paragraph in the opinion relates to a conspiracy, and serves to show that force and violence were in the mind of the court, and that there was no idea of extending the crime of treason by construction beyond the constitutional definition which had been given of it.

Returning to the case actually before the court, it is said: "A design to overturn the government of the United States in New Orleans *by force* would have Idem. been unquestionably a design which if carried into execution would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States."

Now what could reasonably be said to be an assemblage of a body of men for the purpose of overturning the government of the United States in New Orleans by force? Certainly an assemblage in force; an assemblage prepared and intending to act with force; a military assemblage.

The decisions theretofore made by the judges of the United States are then declared to be in conformity with the principles laid down by the Supreme Court. Is this declaration compatible with the idea of departing from those opinions on a point within the contemplation of the court? The opinions of Judge Paterson and Judge Iredell are said "to imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself." This observation certainly indicates that the necessity of an assemblage of men was the particular point the court

All the opinions of the United States judges contemplate an assemblage in force as essential to levying war.

meant to establish, and that the idea of force was never separated from this assemblage.

The opinion of Judge Chase is next quoted with approbation. This opinion in terms requires the employment of force.

After stating the verbal communications said to have been made by Mr. Swartwout to General Wilkinson, the court says: "If these words import that the government of New Orleans was to be revolutionized by force, although merely as a step to or a means of executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war."

The words "any assemblage of men," if construed to affirm that any two or three of the conspirators who might be found together, after this plan had been formed, would be the act of levying war, would certainly be misconstrued. The sense of the expressions, "any assemblage of men," is restricted by the words "for that purpose." Now could it be in the contemplation of the court that a body of men would assemble, for the purpose of revolutionizing New Orleans by force, who should not themselves be in force?

After noticing some difference of opinion among the judges respecting the import of the words said to have been used by Mr. Swartwout, the court proceeds to ob-

serve: "But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried into execution by an open assemblage for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him."

Could the court have conceived "an open assemblage"

Further consideration
of opinion in case of
Bollman and Swart-
wout.

“for the purpose of overturning the government of New Orleans by force” “to be only equivalent to a secret, furtive assemblage without the appearance of force?”

After quoting the words of Mr. Swartwout from the affidavit, in which it was stated that Mr. Burr was levying an army of seven thousand men, and observing that the treason to be inferred from these words would depend on the intention with which it was levied, and on the progress which had been made in levying it, the court say, “The question, then, is, whether this evidence proves Colonel Burr to have advanced so far in levying an army as actually to have assembled them.”

Actually to assemble an army of seven thousand men is unquestionably to place those who are so assembled in a state of open force.

But as the mode of expression used in this passage might be misconstrued, so far as to countenance the opinion that it would be necessary to assemble the whole army in order to constitute the fact of levying war, the court proceeds to say, “It is argued that, since it cannot be necessary that the whole seven thousand men should be assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime.

“This position is correct with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary there should be an actual assemblage; and therefore the evidence should make the fact unequivocal.

There must be an actual assemblage, having the appearance of war.

“The traveling of individuals to the place of rendezvous would, perhaps, not be sufficient. This would be an

equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage."

The position here stated by the counsel for the prosecution is, that the army "commencing its march by detachments to the place of rendezvous (that is, of the army) must be sufficient to constitute the crime."

This position is not admitted by the court to be universally correct. It is said to be "correct with some qualification." What is that qualification?

"The traveling of individuals to the place of rendezvous" (and by this term is not to be understood one individual by himself, but several individuals, either separately or together, but not in military form) "would, perhaps, not be sufficient." Why not sufficient? "Because," says the court, "this would be an equivocal act and has no warlike appearance." The act, then, should be unequivocal and should have a warlike appearance. It must exhibit, in the words of Sir Matthew Hale, *speciem belli*, the appearance of war.

This construction is rendered in some measure necessary, when we observe that the court is qualifying the position, "that the army commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime." In qualifying this position they say, "The traveling of individuals would, perhaps, not be sufficient." Now, a solitary individual traveling to any point, with any intent, could not, without a total disregard of language, be termed a marching detachment. The court, therefore, must have contemplated several individuals traveling together; and the words, being used in reference to the position they were in-

tended to qualify, would seem to indicate the distinction between the appearances attending the usual movement of a company of men for civil purposes, and that military movement which might, in correct language, be denominated "marching by detachments."

The court then proceeded to say: "The meeting of particular bodies of men, and their marching from places of a partial to a place of general rendezvous, would be such an assemblage."

It is obvious, from the context, that the court must have intended to state a case which would in itself be unequivocal, because it would have a warlike appearance.

Opinion in Bollman and Swartwout's case further considered.

The case stated is that of distinct bodies of men assembling at different places, and marching from these places of partial to a place of general rendezvous. When this has been done an assemblage is produced which would in itself be unequivocal. But when is it done? What is the assemblage here described? The assemblage formed of the different bodies of partial at a general place of rendezvous. In describing the mode of coming to this assemblage the civil term "traveling" is dropped and the military term "marching" is employed. If this was intended as a definition of an assemblage which would amount to levying war, the definition requires an assemblage at a general place of rendezvous, composed of bodies of men who had previously assembled at places

Example of an assemblage amounting to a levying of war.

of partial rendezvous. But this is not intended as a definition; for, clearly, if there should be no places of partial rendezvous, if troops should embody in the first instance, in great force, for the purpose of subverting the government by violence, the act would be unequivocal, it would

have a warlike appearance, and it would, according to the opinion of the Supreme Court properly construed, and according to the English authorities, amount to levying war. But this, though not a definition, is put as an example, and surely it may be safely taken as an example. If different bodies of men, in pursuance of a treasonable design plainly proved, should assemble in warlike appearance at places of partial rendezvous, and should *march* from those places to a place of general rendezvous, it is difficult to conceive how such a transaction could take place without exhibiting the appearance of war, without an obvious display of force. At any rate, a court in stating generally such a military assemblage as would amount to levying war, and having a case before them in which there was no assemblage whatever, cannot reasonably be understood in putting such an example to dispense with those appearances of war which seem to be required by the general current of authorities. Certainly they ought not to be so understood when they say in express terms that "It is more safe as well as more consonant to the principles of our Constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the constitutional definition should receive such punishment as the legislature in its wisdom may provide."

After this analysis of the opinion of the Supreme Court, it will be observed that the direct question, whether an assemblage of men which might be construed to amount to a levying of war must appear in force or in military form, was not in argument or in fact before the court, and does not appear to have been in terms decided.

Opinion in Bollman
and Swartwout's case
further considered.

The opinion seems to have been drawn without particularly adverting to this question, and therefore, upon a transient view of particular expressions, might inspire the idea that a display of force, that appearances of war, were not necessary ingredients to constitute the fact of levying war. But upon a more intent and more accurate investigation of this opinion, although the terms "force" and "violence" are not employed as descriptive of the assemblage, such requisites are declared to be indispensable, as can scarcely exist without the appearance of war and the existence of real force. It is said that war must be levied in fact; that the object must be one which is to be effected by force; that the assemblage must be such as to prove that this is its object; that it must not be an equivocal act, without a warlike appearance; that it must be an open assemblage for the purpose of force. In the course of this opinion decisions are quoted and approved which require the employment of force to constitute the crime. It seems extremely difficult, if not impossible, to reconcile these various declarations with the idea that the Supreme Court considered a secret, unarmed meeting, although that meeting be of conspirators, and although it met with a treasonable intent, as an actual levying of war. Without saying that the assemblage must be in force or in warlike form, they express themselves so as to show that this idea was never discarded, and they use terms which cannot be otherwise satisfied.

The opinion of a single judge certainly weighs as nothing, if opposed to that of the Supreme Court; but if he was one of the judges who assisted in framing that opinion, if while the impression under which it was framed was yet fresh upon his mind, he delivered an

Idem. opinion on the same testimony, not contradictory to that which had been given by all the judges together, but showing the sense in which he understood terms that might be differently expounded, it may fairly be said to be in some measure explanatory of the opinion itself.

To the judge before whom the charge against the prisoner at the bar was first brought the same testimony was offered with that which had been exhibited before the Supreme Court, and he was required to give an opinion in almost the same case. Upon this occasion he said, "War can only be levied by the employment of actual force. Troops must be embodied, men must be assembled, in order to levy war." Again, he observed, "The fact to be proved in this case is an act of public notoriety. It must exist in the view of the world, or it cannot exist at all. The assembling of forces to levy war is a visible transaction, and numbers must witness it."

It is not easy to doubt what kind of assemblage was in the mind of the judge who used these expressions, and it is to be recollected that he had just returned from the Supreme Court, and was speaking on the very facts on which the opinion of that court was delivered.

The same judge, in his charge to the grand jury who found this bill, observed, "To constitute the fact of levying war, it is not necessary that hostilities shall have actually commenced by engaging the military force of the United States, or that measures of violence against the government shall have been carried into execution. But levying war is a fact in the constitution of which force is an indispensable ingredient. Any combination to subvert by force the government of the United States,

Charge of judge to grand jury who found indictment in present case.

violently to dismember the Union, to compel a change in the administration, to coerce the repeal or adoption of a general law, is a conspiracy to levy war; and if the conspiracy be carried into effect by the actual employment of force, by the embodying and assembling of men for the purpose of executing the treasonable design which was previously conceived, it amounts to levying of war. It has been held that arms are not essential to levying war, provided the force assembled be sufficient to attain, or perhaps to justify attempting, the object without them." This paragraph is immediately followed by a reference to the opinion of the Supreme Court.

It requires no commentary upon these words to show that, in the opinion of the judge who uttered them, an assemblage of men which should constitute the fact of levying war must be an assemblage in force, and that he so understood the opinion of the Supreme Court. If in that opinion there may be found in some passages a want of precision, and indefiniteness of expression, which has occasioned it to be differently understood by different persons, that may well be accounted for, when it is recollected that in the particular case there was no assemblage whatever. In expounding that opinion the whole should be taken together, and in reference to the particular case in which it was delivered. It is, however, not improbable that the misunderstanding has arisen from this circumstance. The court, unquestionably, did not consider arms as an indispensable requisite to levying war; an assemblage adapted to the object might be in a condition to effect or to attempt it without them. Nor did the court consider the actual application of the force to the object, at all times, an indispensable requisite; for

Assemblage of men in force necessary to constitute fact of levying war.

an assemblage might be in a condition to apply force, might be in a state adapted to real war, without having made the actual application of that force. From these positions, which are to be found in the opinion, it may have inferred, it is thought too hastily, that the nature of the assemblage was unimportant, and that war might be considered as actually levied by any meeting of men, if a criminal intention can be imputed to them by testimony of any kind whatever.

It has been thought proper to discuss this question at large, and to review the opinion of the Supreme Court, although this court would be more disposed to

Idem. leave the question of fact, whether an overt act of levying war was committed on Blennerhassett's Island, to the jury, under this explanation of the law, and to instruct them that, unless the assemblage on Blennerhassett's Island was an assemblage in force, was a military assemblage in a condition to make war, it was not a levying of war, and that they could not construe it into an act of war, than to arrest the further testimony which might be offered to connect the prisoner with that assemblage, or to prove the intention of those who assembled together at that place. This point, however, is not to be understood as decided. It will, perhaps, constitute an essential inquiry in another case.

Before leaving the opinion of the Supreme Court entirely, on the question of the nature of the assemblage which will constitute an act of levying war, this court cannot forbear to ask, Why is an assemblage absolutely required? Is it not to judge, in some measure, of the end by the proportion which the means bear to the end? Why is it that a single armed individual, entering a boat

Why is an assemblage absolutely required to constitute act of levying war.

and sailing down the Ohio, for the avowed purpose of attacking New Orleans, could not be said to levy war? Is it not that he is apparently not in a condition to levy war? If this be so, ought not the assemblage to furnish some evidence of its intention and capacity to levy war before it can amount to levying war? And ought not the Supreme Court, when speaking of an assemblage for the purpose of effecting a treasonable object by force, be understood to indicate an assemblage exhibiting the appearance of force?

The definition of the attorney for the United States deserves notice in this respect. It is, "When there is an assemblage of men convened for the purpose of effecting by force a treasonable object, which force is meant to be employed before the assemblage disperses, this is treason."

To read this definition without adverting to the argument, we should infer that the assemblage was itself to effect by force the treasonable object, not to join itself to some other bodies of men, and then to effect the object by their combined force. Under this construction it would be expected the appearance of the assemblage would bear some proportion to the object, and would indicate the intention; at any rate, that it would be an assemblage in force. This construction is most certainly not that which was intended, but it serves to show that general phrases must always be understood in reference to the subject-matter, and to the general principles of law.

On that division of the subject which respects the merits of the case connected with the pleadings, two points are also made.

The merits of the case connected with the pleadings.

1st. That this indictment, having charged the prisoner with levying war on Blennerhassett's Island, and containing no other overt act, cannot be supported by proof that war was levied at that place by other persons, in the absence of the prisoner, even admitting those persons to be connected with him in one common treasonable conspiracy.

Absence of prisoner from Blennerhassett's Island when overt act was committed.

2d. That, admitting such an indictment could be supported by such evidence, the previous conviction of some person who committed the act which is said to amount to levying war is indispensable to the conviction of a person who advised or procured that act.

Conviction of person who committed act essential to conviction of another as accessory.

As to the first point, the indictment contains two counts, one of which charges that the prisoner, with a number of persons unknown, levied war on Blennerhassett's Island, in the county of Wood, in the district of Virginia; and the other adds the circumstance of their proceeding from that island down the river, for the purpose of seizing New Orleans by force.

In point of fact, the prisoner was not on Blennerhassett's Island, nor in the county of Wood, nor in the district of Virginia.

In considering this point, the court is led first to inquire whether an indictment for levying war must specify an overt act, or would be sufficient if it merely charged the prisoner in general terms with having levied war, omitting the expression of place or circumstance.

Indictment for levying war must specify overt act.

The place in which a crime was committed is essential

to an indictment, were it only to show the jurisdiction of the court. It is also essential for the purpose of enabling the prisoner to make his defense. That at common law an indictment would have been defective, which did not mention the place in which the crime was committed, can scarcely be doubted. For this it is sufficient to refer to Hawkins, b. 2, c. 25, § 84, and c. 23, § 91. This necessity is rendered the stronger by the constitutional provision that the offender "shall be tried in the State and district wherein the crime shall have been committed," and by the act of Congress which requires that twelve petty jurors, at least, shall be summoned from the county where the offense was committed.

Place in which crime committed essential to an indictment.

A description of the particular manner in which the war was levied seems also essential, to enable the accused to make his defense. The law does not expect a man to be prepared to defend every act of his life which may be suddenly and without notice alleged against him. In common justice, the particular fact with which he is charged ought to be stated, and stated in such a manner as to afford a reasonable certainty of the nature of the accusation, and the circumstances which will be adduced against him. The general doctrine on the subject of indictments is full to this point. Foster (p. 149), speaking of the treason of compassing the king's death, says, "From what has been said it followeth that in every indictment for this species of treason, and, indeed, for levying war and adhering to the king's enemies, an overt act must be alleged and proved. For the overt act is the charge to which the prisoner must apply his defense."

Description of particular manner in which war was levied essential.

In page 220 Foster repeats this declaration. It is also laid down in Hawkins, b. 8, c. 17, § 29; 1 Hale, 121; 1 East, 116, and by the other authorities cited, especially Vaughan's case. In corroboration of this opinion, it may be observed that treason can only be established by the proof of overt acts, and that, by the common law, as well as by the statute of 7th of William III., those overt acts only which are charged in the indictment can be given in evidence, unless, perhaps, as corroborative testimony after the overt acts are proved. That clause in the Constitution, too, which says that in all criminal prosecutions the accused shall enjoy the right "to be informed of the nature and cause of the accusation," is considered as having a direct bearing on this point. It secures to him such information as will enable him to prepare for his defense.

It seems, then, to be perfectly clear that it would not be sufficient for an indictment to allege generally that the accused had levied war against the United States. The charge must be more particularly specified, by laying what is termed an overt act of levying war. The law relative to an appeal, as cited from Stamford, is strongly corroborative of this opinion.

If it be necessary to specify the charge in the indictment, it would seem to follow, irresistibly, that the charge must be proved as laid.

All the authorities which require an overt act require also that this overt act should be proved. The decision in Vaughan's case is particularly in point. Might it be otherwise, the charge of an overt act would be a mischief instead of an advantage to the accused. It would lead him from

Treason can only be established by proof of overt acts, which must be charged in the indictment.

Overt act must be proved.

the true cause and nature of the accusation, instead of informing him respecting it.

But it is contended on the part of the prosecution, that, although the accused had never been with the party which assembled at Blennerhassett's Island, and was at the time at a great distance, and in a different State, he was yet legally present, and therefore may properly be charged in the indictment as being present in fact.

Question raised whether doctrine of constructive presence at time of overt act is applicable.

It is therefore necessary to inquire whether in this case the doctrine of constructive presence can apply.

It is conceived by the court to be possible that a person may be concerned in a treasonable conspiracy and yet be legally, as well as actually, absent, Idem. while some one act of the treason is perpetrated. If a rebellion should be so extensive as to spread through every State in the Union, it will scarcely be contended that every individual concerned in it is legally present at every overt act committed in the course of that rebellion. It would be a very violent presumption indeed, too violent to be made without clear authority, to presume that even the chief of the rebel army was legally present at every such overt act. If the main rebel army, with the chief at its head, should be prosecuting war at one extremity of our territory, say in New Hampshire; if this chief should be there captured and sent to the other extremity for the purpose of trial; if his indictment, instead of alleging an overt act, which was true in point of fact, should allege that he had assembled some small party, which in truth he had not seen, and had levied war by engaging in a skirmish in Georgia, at a time when in reality he was fighting a battle in New Hampshire; if such evidence would support such an indictment, by

the fiction that he was legally present, though really absent, all would ask, To what purpose are those provisions in the Constitution which direct the place of trial, and ordain that the accused shall be informed of the nature and cause of the accusation?

But that a man may be legally *absent* who has counseled or procured a treasonable act is proved by all those books which treat upon the subject, and which concur in declaring that such a person is a principal traitor, not because he was legally present, but because in treason all are principals. Yet the indictment upon general principles would charge him according to the truth of the case.

Lord Coke quoted.

Lord Coke says, "If many conspire to levy war, and some of them do levy the same according to the conspiracy, this is high treason in all." Why? Because all were legally present when the war was levied? No. "For in treason," continues Lord Coke, "all be principals, and war is levied." In this case the indictment, reasoning from analogy, would not charge that the absent conspirators were present, but would state the truth of the case. If the conspirator had done nothing which amounted to levying of war, and if by our Constitution the doctrine that an accessory becomes a principal be not adopted, in consequence of which the conspirator could not be condemned under an indictment stating the truth of the case, it would be going very far to say that this defect, if it be termed one, may be cured by an indictment stating the case untruly.

This doctrine of Lord Coke has been adopted by all subsequent writers; and it is generally laid down in the English books that whatever will make a man an accessory in felony will make him a principal in treason; but it is no-

Doctrine of constructive presence further considered.

where suggested that he is by construction to be considered as present when in point of fact he was absent.

Foster has been particularly quoted, and certainly he is precisely in point. "It is well known," says

Foster, "that in the language of the law Foster quoted. there are no accessories in high treason; all are principals. Every instance of incitement, aid, or protection, which in the case of felony will render a man an accessory before or after the fact, in the case of high treason, whether it be treason at common law or by statute, will make him a principal in treason." The cases of incitement and aid are cases put as examples of a man's becoming a principal in treason, not because he was legally present, but by force of that maxim in the common law, that whatever will render a man an accessory at common law will render him a principal in treason. In other passages the words "command" or "procure" are used to indicate the same state of things, that is, a treasonable assemblage procured by a man who is not himself in that assemblage.

In point of law, then, the man who incites, aids, or procures a treasonable act is not, merely in consequence of that incitement, aid, or procurement, legally present when that act is committed.

If it does not result from the nature of the crime that all who are concerned in it are legally present at every overt act, then each Doctrine of constructive presence further examined. case depends upon its own circumstances; and to judge how far the circumstances of any case can make him legally present who is in fact absent, the doctrine of constructive presence must be examined.

Hale (in his 1st vol. p. 615) says, "Regularly no man can be a principal in felony un- Hale quoted.

less he be present." In the same page he says, "An accessory *before* is he that, being absent at the time of the felony committed, doth yet procure, counsel, or command another to commit a felony." The books are full of passages which state this to be the law. Foster, in showing what acts of concurrence will make a man a principal, says, "He must be present at the perpetration, otherwise he can be no more than an accessory before the fact."

These strong distinctions would be idle, at any rate they would be inapplicable to treason, if they were to be entirely lost in the doctrine of constructive presence.

Foster adds (page 349), "When the law requireth the presence of the accomplice at the perpetration of the fact in order to render him a principal, it doth not require a strict, actual, immediate presence, such a presence as would make him an eye or ear witness of what passeth." The terms used by Foster are such as would be employed by a man intending to show the necessity that the absent person should be near at hand, although, from the nature of the thing, no precise distance could be marked out. An inspection of the cases from which Foster drew this general principle will serve to illustrate it. (See Hale, p. 439.) In all these

Cases cited by Hale. cases put by Hale, the whole party set out together to commit the very fact charged in the indictment, or to commit some other unlawful act, in which they are all to be personally concerned at the same time and place, and are, at the very time when the criminal fact is committed, near enough to give actual personal aid and assistance to the man who perpetrated it. Hale (in page 449), giving the reason for the decision in the case of the Lord Dacres, says, "They all came with an intent to steal the deer, and con-

sequently the law supposes that they all came with the intent to oppose all that should hinder them in that design." The original case says this was their resolution. This opposition would be a personal opposition. This case, even as stated by Hale, would clearly not comprehend any man who entered into the combination, but who, instead of going to the park where the murder was committed, should not set out with the others, should go to a different park, or should even lose his way. (See Hale, p. 534.)

In both the cases here stated the persons actually set out together, and were near enough to assist in the commission of the fact.

Cases cited by Hale.

That in the case of Pudsy the felony was, as stated by Hale, a different felony from that originally intended, is unimportant in regard to the particular principle now under consideration, so far as respected distance; as respected capacity to assist in case of resistance, it is the same as if the robbery had been that which was originally designed. The case in the original report shows that the felony committed was in fact in pursuance of that originally designed. Foster (p. 350) plainly supposes the same particular design, not a general design composed of many particular, distinct facts. He supposes them to be co-operating with respect to that particular design. This may be illustrated by a case which is perhaps common. Suppose a band of robbers confederated for the general purpose of robbing. They set out together, or in parties, to rob a particular individual, and each performs the part assigned to him. Some ride up to the individual and demand his purse, others watch out of sight to intercept those who might be coming to assist the man on whom the robbery is to be committed.

If murder or robbery actually take place, all are principals, and all, in construction of law, are present. But suppose they set out at the same time, or at different times, by different roads, to attack and rob different individuals or different companies; to commit distinct acts of robbery. It has never been contended that those who committed one act of robbery, or who failed altogether, were constructively present at the act of those who were associated with them in the common object of robbery, who were to share the plunder, but who did not assist at the particular fact. They do, indeed, belong to the general party, but they are not of the particular party which committed this fact. Foster concludes this subject by observing that, "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary." That is, at the particular fact which is charged, he must be ready to render assistance to those who are committing that particular fact; he must, as is stated by Hawkins, be ready to give immediate and direct assistance.

All the cases to be found in the books go to the same point. Let them be applied to that under consideration.

Whole question is whether Burr was legally present at the levying of war in Blennerhassett's Island.

The whole treason laid in this indictment is the levying of war in Blennerhassett's Island, and the whole question to which the inquiry of the court is now directed is, whether the prisoner was legally present at that fact.

I say this is the whole question, because the prisoner can only be convicted on the overt act laid in the indictment. With respect to this prosecution, it is as if no other overt act existed. If other overt acts can be in-

quired into, it is for the sole purpose of proving the particular fact charged; it is as evidence of the crime consisting of this particular fact, not as establishing the general crime by a distinct fact.

The counsel for the prosecution have charged those engaged in the defense with considering the overt act as the treason, whereas it ought to be considered solely as the evidence of the treason; but the counsel for the prosecution seem themselves not to have sufficiently adverted to this clear principle, that, though the overt act may not be itself the treason, it is the sole act of that treason which can produce conviction. It is the sole point in issue between the parties. And the only division of that point, if the expression be allowed, which the court is now examining, is the constructive presence of the prisoner at the fact charged.

To return, then, to the application of the cases.

Had the prisoner set out with the party from Beaver for Blennerhassett's Island, or, perhaps, Application of cases cited to present case. had he set out for that place, though not from Beaver, and had arrived in the island, he would have been present at the fact; had he not arrived in the island, but had taken a position near enough to co-operate with those on the island, to assist them in any act of hostility, or to aid them if attacked, the question whether he was constructively present would be a question compounded of law and fact, which would be decided by the jury, with the aid of the court, so far as respected the law. In this case the accused would have been of the particular party assembled on the island, and would have been associated with them in the particular act of levying war said to have been committed on the island.

But if he was not with the party at any time before

they reached the island; if he did not join them there, or intend to join them there; if his personal co-operation in the general plan was to be afforded elsewhere, at a great distance, in a different State; if the overt acts of treason to be performed by him were to be distinct overt acts,—then he was not of the particular party assembled at Blennerhassett's Island, and was not constructively present, aiding and assisting in the particular act which was there committed.

The testimony on this point, so far as it has been delivered, is not equivocal. There is not only no evidence that the accused was of the particular party which assembled on Blennerhassett's Island, but the whole evidence shows he was not of that party.

Evidence shows that Burr was not present at Blennerhassett's Island.

In felony, then, admitting the crime to have been completed on the island, and to have been advised, procured, or commanded by the accused, he would have been incontestably an accessory, and not a principal.

But in treason, it is said, the law is otherwise, because the theatre of action is more extensive.

This reasoning applies in England as strongly as in the United States. While in 1715 and 1745 the family of Stuart sought to regain the crown they had forfeited, the struggle was for the whole kingdom; yet no man was ever considered as legally present at one place when actually at another; or as aiding in one transaction while actually employed in another.

With the perfect knowledge that the whole nation may be the theatre of action, the English books unite in declaring that he who counsels, procures or aids treason is guilty accessorially, and solely in virtue of the common-

Proof must be limited to particular overt acts of levying war with which prisoner is charged.

law principle that what will make a man an accessory in felony makes him a principal in treason. So far from considering a man as constructively present at every overt act of the general treason in which he may have been concerned, the whole doctrine of the books limits the proof against him to those particular overt acts of levying war with which he is charged.

What would be the effect of a different doctrine? Clearly that which has been stated. If a person levying war in Kentucky may be said to be constructively present and assembled with a party carrying on war in Virginia, at a great distance from him, then he is present at every overt act performed anywhere; he may be tried in any state on the continent where any overt act has been committed; he may be proved to be guilty of an overt act laid in the indictment in which he had no personal participation, by proving that he advised it, or that he committed other acts.

This is perhaps too extravagant to be in terms maintained. Certainly it cannot be supported by the doctrines of the English law.

The opinion of Judge Paterson in Mitchell's case has been cited on this point. (2 Dallas, 348.)

Opinion of Judge Paterson in Mitchell's case cited, and facts stated.

The indictment is not specially stated; but from the case as reported it must have been either general, for levying war in the county of Alleghany, and the overt act laid must have been the assemblage of men and levying of war in that county, or it must have given a particular detail of the treasonable transactions in that county. The first supposition is the most probable; but let the indictment be in the one form or the other, and the result is the same. The facts of the case are that a

large body of men, of whom Mitchell was one, assembled at Braddock's field, in the county of Alleghany, for the purpose of committing acts of violence at Pittsburgh; that there was also an assemblage at a different time at Couches fort, at which the prisoner also attended. The general and avowed object of that meeting was to concert measures for resisting the execution of a public law. At Couches fort the resolution was taken to attack the house of the inspector, and the body there assembled marched to that house and attacked it. It was proved, by the competent number of witnesses, that he was at Couches fort armed; that he offered to reconnoitre the house to be attacked; that he marched with the insurgents towards the house; that he was with them after the action, attending the body of one of his comrades who was killed in it; one witness swore positively that he was present at the burning of the house, and a second witness said that "it ran in his head that he had seen him there." That a doubt should exist in such a case as this is strong evidence of the necessity that the overt act should be unequivocally proved by two witnesses.

But what was the opinion of the judge in this case?

Idem. Couches fort and Neville's house being in the same county; the assemblage having been at Couches fort, and the resolution to attack the house having been there taken; the body having, for the avowed purpose, moved, in execution of that resolution, towards the house to be attacked,—he inclined to think that the act of marching was in itself levying war. If it was, then the overt act laid in the indictment was consummated by the assemblage at Couches and the marching from thence, and Mitchell was proved to be guilty by more than two positive witnesses. But without deciding this

to be the law, he proceeded to consider the meeting at Couches, the immediate marching to Neville's house, and the attack and burning of the house, as one transaction. Mitchell was proved by more than two positive witnesses to have been in that transaction, to have taken an active part in it, and the judge declared it to be unnecessary that all should have seen him at the same time and place.

But suppose not a single witness had proved Mitchell to have been at Couches, or on the march, or at Neville's. Suppose he had been at the time notoriously absent in a different State. Can it be believed by any person, who observes the caution with which Judge Paterson required the constitutional proof of two witnesses to the same overt act, that he would have said Mitchell was constructively present, and might, on that straining of a legal fiction, be found guilty of treason? Had he delivered such an opinion, what would have been the language of this country respecting it? Had he given this opinion, it would have required all the correctness of his life to strike his name from that bloody list in which the name of Jefferies is enrolled.

But to estimate the opinion in Mitchell's case, let its circumstances be transferred to Burr's case. Suppose the body of men assembled in Blennerhassett's Island had previously met at some other place in the same county, and that Burr had been proved to be with them by four witnesses; that the resolution to march to Blennerhassett's Island for a treasonable purpose had been there taken; that he had been seen on the march with them; that one witness had seen him on the island; that another thought he had seen him there; that he had been

Idem.

Application of Mitchell's case to Burr's case.

seen with the party directly after leaving the island; that this indictment had charged the levying of war in Wood county generally; the cases would then have been perfectly parallel, and the decisions would have been the same.

In conformity with principle and with authority, then, the prisoner at the bar was neither legally nor actually present at Blennerhassett's Island; and the court is strongly inclined to the opinion that, without proving an actual or legal presence by two witnesses, the overt act laid in this indictment cannot be proved.

Burr neither legally nor actually present at Blennerhassett's Island.

But this opinion is controverted on two grounds.

The first is, that the indictment does not charge the prisoner to have been present.

The second, that, although he was absent, yet if he caused the assemblage, he may be indicted as being present, and convicted on evidence that he caused the treasonable act.

The first position is to be decided by the indictment itself. The court understands the allegation differently from the attorney for the United States. The court understands it to be directly charged that the prisoner did assemble with the multitude, and did march with them. Nothing will more clearly test this construction than putting the case into a shape which it may possibly take. Suppose the law to be that the indictment would be defective unless it alleged the presence of the person indicted at the act of treason. If upon a special verdict facts should be found which amounted to a levying of war by the accused, and his counsel should insist that he could not be condemned, because the indictment was defective in not

Construction of the indictment on this point.

charging that he was himself one of the assemblage which constituted the treason, or because it alleged the procurement defectively, would the attorney admit this construction of his indictment to be correct? I am persuaded that he would not, and that he ought not to make such a concession. If, after a verdict, the indictment ought to be construed to allege that the prisoner was one of the assemblage at Blennerhassett's Island, it ought to be so construed now. But this is unimportant; for if the indictment alleges that the prisoner procured the assemblage, that procurement becomes part of the overt act, and must be proved, as will be shown hereafter.

The second position is founded on 1 Hale, 214, 288, and 1 East, 127.

While I declare that this doctrine contradicts every idea I had ever entertained on the subject of indictments, since it admits that one case may be stated and a very different case may be proved, I will acknowledge that it is countenanced by the authorities adduced in its support. To counsel or advise a treasonable assemblage, and to be one of that assemblage, are certainly distinct acts, and therefore ought not to be charged as the same act. The great objection to this mode of proceeding is, that the proof essentially varies from the charge, in the character and essence of the offense, and in the testimony by which the accused is to defend himself. These dicta of Lord Hale, therefore, taken in the extent in which they are understood by the counsel for the United States, seem to be repugnant to the declarations we find everywhere, that an overt act must be laid, and

Doctrine that one who counsels or advises a treasonable assemblage, though absent, may be indicted as being present—founded on dicta of Lord Hale.

Dicta of Lord Hale critically examined.

must be proved. No case is cited by Hale in support of them, and I am strongly inclined to the opinion that, had the public received his corrected instead of his original manuscript, they would, if not expunged, have been restrained in their application to cases of a particular description. Laid down generally, and applied to all cases of treason, they are repugnant to the principles for which Hale contends, for which all the elementary writers contend, and from which courts have in no case, either directly reported or referred to in the books, ever departed. These principles are, that the indictment must give notice of the offense, that the accused is only bound to answer the particular charge which the indictment contains, and that the overt act laid is that particular charge. Under such circumstances, it is only doing justice to Hale to examine his dicta, and if they will admit of being understood in a limited sense, not repugnant to his own doctrines, nor to the general principles of law, to understand them in that sense.

“If many conspire to counterfeit, or counsel, or abet it, and one of them doth the fact upon that counseling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within the statute, for in such case, in treason, all are principals.”

This is laid down as applicable singly to the treason of counterfeiting the coin and is not applied by Hale to other treasons. Had he designed to apply the principle universally, he would have stated it as a general proposition; he would have laid it down in treating on other branches of the statute as well as in the chapter respecting the coin; he would have laid it down when treating on in-

Doctrine restricted by
Lord Hale to treason
of counterfeiting the
coin.

dictments generally. But he has done neither. Every sentiment bearing in any manner on this point, which is to be found in Lord Hale, while on the doctrine of levying war, or on the general doctrine of indictments, militates against the opinion that he considered the proposition as more extensive than he has declared it to be. No court could be justified in extending the dictum of a judge beyond its terms, to cases in which he has expressly treated, to which he has not himself applied it, and on which he, as well as others, has delivered opinions which that dictum would overrule. This would be the less justifiable if there should be a clear legal distinction, indicated by the very terms in which the judge has expressed himself, between the particular case to which alone he has applied the dictum and other cases to which the court is required to extend it.

There is this clear legal distinction: "They may," says Judge Hale, "be indicted for counterfeiting generally." But if many conspire to levy war, and some actually levy it, they may not be indicted for levying war generally. The books concur in declaring that they cannot be so in-

Distinction between indictments for counterfeiting the coins and for levying war.

dicted. A special overt act of levying war must be laid. This distinction between counterfeiting the coins and that class of treasons among which levying war is placed is taken in the statute of Edward III. That statute requires an overt act of levying war to be laid in the indictment, and does not require an overt act of counterfeiting the coin to be laid. If in a particular case, where a general indictment is sufficient, it be stated that the crime may be charged generally according to the legal effect of the act, it does not follow that in other cases, where a general indictment would be insufficient, where an

overt act must be laid, that this overt act need not be laid according to the real fact. Hale, then, is to be reconciled with himself and with the general principles of law, only by permitting the limits which he has himself given to his own dictum to remain where he has placed them.

Overt act must be laid according to the real fact.

In page 238 Hale is speaking generally of the receiver of a traitor and is stating in what such receiver partakes of an accessory. 1st. "His indictment must be special of the receipt and not generally that he did the thing, which may be otherwise in case of one that is procurer, counselor or consenter."

The words "*may* be otherwise" do not clearly convey the idea that it is universally otherwise. In all cases of a receiver the indictment *must* be special on the receipt, and not general. The words, it "*may* be otherwise in case of a procurer," etc., signify that it may be otherwise in all treasons, or that it may be otherwise in some treasons. If it may be otherwise in some treasons without contradicting the doctrines of Hale himself, as well as of other writers, but cannot be otherwise in all treasons without such contradiction, the fair construction is that Hale used these words in their restricted sense; that he used them in reference to treasons in which a general indictment would lie, not to treasons where a general indictment would not lie, but an overt act of the treason must be charged. The two passages of Hale thus construed may, perhaps, be law, and may leave him consistent with himself. It appears to the court to be the fair way of construing them.

Distinction between indictments which may state the fact generally and those which must lay it specially.

These observations relative to the passages quoted

from Hale apply to that quoted from East, who obviously copies from Hale, and relies upon his authority.

Upon this point, Keeling, 26, and 1 Hale, 626, have also been relied upon. It is stated in both, that, if a man be indicted as a principal and acquitted, Indictments as principal and as accessory—Distinction. he cannot afterwards be indicted as accessory before the fact. Whence it is inferred, not without reason, that evidence of accessorial guilt may be received on such an indictment. Yet no case is found in which the question has been made and decided. The objection has never been taken at a trial and overruled, nor do the books say it would be overruled. Were such a case produced, its application would Keeling and Hale referred to. be questionable. Keeling says, an accessory before the fact is *quodam modo*, in some manner, guilty of the fact. The law may not require that the manner should be stated, for in felony it does not require that an overt act should be laid. The indictment, therefore, may be general. But an overt act of levying war must be laid. These cases, then, prove, in their utmost extent, no more than the cases previously cited from Hale and East. This distinction between indictments which may state the fact generally, and those which must lay it specially, bear some analogy to a general and a special action on the case. In a general action, the declaration may lay the *assumpsit* according to the legal effect of the transaction, but in a special action on the case the declaration must state the material circumstances truly, and they must be proved as stated. This distinction also derives some aid from a passage in Hale (p. 625), immediately preceding that which has been cited at the bar. He says, "If A. be indicted as principal, and B. as accessory *before* or *after*, and both be

acquitted, yet B. may be indicted as principal, and the former acquittal as accessory is no bar."

The crimes, then, are not the same, and may not indifferently be tried under the same indictment. But why

Idem. is it that an acquittal as principal may be pleaded in

bar to an indictment as accessory, while an acquittal as accessory may not be pleaded in bar to an indictment as principal? If it be answered that the accessorial crime may be given in evidence on an indictment as principal, but that the principal crime may not be given in evidence on an indictment as accessory, the question recurs, on what legal ground does this distinction stand? I can imagine only this. An accessory being *quodam modo* a principal, in indictments, where the law does not require the manner to be stated, which need not be special, evidence of accessorial guilt, if the punishment be the same, may possibly be received; but every indictment as an accessory must be special. The very allegation that he is an accessory must be a special allegation, and must show how he became an accessory. The charges of this special indictment, therefore, must be proved as laid, and no evidence which proves the crime in a form substantially different can be received. If this be the legal reason for the distinction, it supports the exposition of these dicta which has been given. If it be not the legal reason, I can conceive no other.

But suppose the law to be as is contended by the counsel for the United States. Suppose an indictment, charging an individual with personally assembling among others, and thus levying war, may be satisfied with the proof that he caused the assemblage. What effect will this law have upon this case?

The guilt of the accused, if there be any guilt, does not

consist in the assemblage, for he was not a member of it. The simple fact of assemblage no more affects one absent man than another. His guilt, then, consists in procuring the assemblage, and upon this fact depends its criminality. The proof relative to the character of an assemblage must be the same whether a man be present or absent. In the general, to charge any individual with the guilt of an assemblage, the fact of his presence must be proved. It constitutes an essential part of the overt act. If, then, the procurement be substituted in the place of presence, does it not also constitute an essential part of the overt act? Must it not also be proved? Must it not be proved in the same manner that presence must be proved? If in one case the presence of the individual makes the guilt of the assemblage his guilt, and in the other case the procurement by the individual makes the guilt of the assemblage his guilt, then presence and procurement are equally component parts of the overt act, and equally require two witnesses.

Proof requisite where one is charged with causing an assemblage of men for purpose of levying war.

Collateral points may, say the books, be proved according to the course of the common law; but is this a collateral point? Is the fact without which the accused does not participate in the guilt of the assemblage, if it was guilty, a collateral point? This cannot be. The presence of the party, where presence is necessary, being a part of the overt act, must be positively proved by two witnesses. No presumptive evidence, no facts from which presence may be conjectured or inferred, will satisfy the Constitution and the law. If procurement take the place of presence, and become part of the overt act, then no presumptive evidence, no facts from which

Fact of causing such assemblage cannot be presumed but must be positively proved by two witnesses.

the procurement may be conjectured or inferred, can satisfy the Constitution and the law. The mind is not to be led to the conclusion that the individual was present, by a train of conjectures or inferences, or of reasoning; the fact must be proved by two witnesses. Neither where procurement supplies the want of presence is the mind to be conducted to the conclusion that the accused procured the assembly, by a train of conjectures or inferences, or of reasoning; the fact itself must be proved by two witnesses, and must have been committed within the district.

It is said that the advising or procurement of treason is a secret transaction which can scarcely ever be proved in the manner required by this opinion. The answer which will readily suggest itself is that the difficulty of proving a fact will not justify conviction without proof. Certainly it will not justify conviction without a direct and positive witness in a case where the Constitution requires two. The more correct inference from this circumstance would seem to be that the advising of the fact is not within the constitutional definition of the crime. To advise or procure a treason is in the nature of conspiring or plotting treason, which is not treason in itself.

If, then, the doctrines of Keeling, Hale, and East are to be understood in the sense in which they are pressed by the counsel for the prosecution, and are applicable in the United States, the fact that the accused procured the assemblage on Blennerhassett's Island must be proved, not circumstantially, but positively by two witnesses, to charge him with that assemblage. But there are still other most important considerations, which must be well weighed before this doctrine can be applied to the United States.

But is one who advises or procures a treason, guilty of treason under the Constitution?

The eighth amendment to the Constitution has been pressed with great force, and it is impossible not to feel its application to this point. The accused cannot be truly said to be "informed of the nature and cause of the accusation," unless the indictment shall give him that notice which may reasonably suggest to him the point on which the accusation turns, so that he may know the course to be pursued in his defense.

Eighth amendment—
Accused must be informed of nature and cause of accusation.

It is also well worthy of consideration that this doctrine, so far as it respects treason, is entirely supported by the operation of the common law, which is said to convert the accessory before the fact into the principal, and to make the act of the principal his act. The accessory before the fact is not said to have levied war. He is

The principles of the
common law of England
not applicable.

not said to be guilty under the statute. But the common law attaches to him the guilt of that fact which he has advised or procured, and, as contended, makes it his act. This is the operation of the common law, not the operation of the statute. It is an operation, then, which can only be performed where the common law exists to perform it. It is the creature of the common law, and the creature presupposes its creator. To decide, then, that this doctrine is applicable to the United States would seem to imply the decision that the United States, as a nation, have a common law which creates and defines the punishment of crimes accessorial in their nature. It would imply the further decision that these accessorial crimes are not in the case of treason excluded by the definition of treason given in the Constitution. I will not pretend that I have not individually an opinion on these points, but it is one which I should give only in a case

absolutely requiring it, unless I could confer respecting it with the judges of the Supreme Court.

I have said that this doctrine cannot apply to the United States without implying those decisions respecting the common law which I have stated, because, should it be true, as is contended, that the constitutional definition of treason comprehends him who advises or procures an assemblage that levies war, it would not follow that such adviser or procurer might be charged as having been present at the assemblage. If the adviser or procurer is within the definition of levying war, and, independent of the agency of the common law, does actually levy war, then the advisement or procurement is an overt act of levying war. If it be the overt act on which he is to be convicted, then it must be charged in the indictment, for he can only be convicted on proof of the overt acts which are charged.

To render this distinction more intelligible, let it be recollected that, although it should be conceded that since the statute of William and Mary, he who advises or procures a treason may in England be charged as having committed that treason,—by virtue of the common-law operation, which is said, so far as respects the indictment, to unite the accessorial to the principal offense and permit them to be charged as one,—yet it can never be conceded that he who commits one overt act under the statute of Edward can be charged and convicted on proof of another overt act. If, then, procurement be an overt act of treason under the Constitution, no man can be convicted for the procurement under an indictment charging him with actually assembling, whatever may be the doctrine of the common law in the case of an accessorial offender.

If procurement be an overt act of treason, it must be alleged in the indictment and proved.

Idem.

It may not be improper in this place again to advert to the opinion of the Supreme Court, and to show that it contains nothing contrary to the doctrine now laid down. That opinion is that an individual may be guilty of treason "who has not appeared in arms against his country; that, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable object, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."

Opinion of Supreme Court in case of Bollman and Swartwout again adverted to.

This opinion does not touch the case of a person who advises or procures an assemblage, and does nothing further. The advising, certainly, and perhaps the procuring, is more in the nature of a conspiracy to levy war than of the actual levying of war. According to the opinion it is not enough to be leagued in the conspiracy, and that war be levied, but it is also necessary to perform a part; that part is the act of levying war. This part, it is true, may be minute; it may not be the actual appearance in arms, and it may be remote from the scene of action, that is, from the place where the army is assembled; but it must be a part, and that part must be performed by a person who is leagued in the conspiracy. This part, however minute or remote, constitutes the overt act on which alone the person who performs it can be convicted.

Idem.

Procuring an assemblage more in nature of conspiracy to levy war.

The opinion does not declare that the person who has performed this remote and minute part may be indicted for a part which was in truth performed by others, and convicted on their overt acts. It amounts

Idem.

to this, and nothing more: that when war is actually levied, not only those who bear arms, but those also who are leagued in the conspiracy, and who perform the various distinct parts which are necessary for the prosecution of war, do, in the sense of the Constitution, levy war. It may possibly be the opinion of the Supreme Court that those who procure a treason, and do nothing further, are guilty under the Constitution; I only say that opinion has not yet been given; still less has it been indicated that he who advises shall be indicted as having performed the fact.

It is, then, the opinion of the court that this indictment can be supported only by testimony which proves the accused to have been actually or constructively present when the assemblage took place on Blennerhassett's Island, or by the admission of the doctrine that he who procures an act may be indicted as having performed that act.

Testimony necessary
to support indictment
of Burr.

It is further the opinion of the court that there is no testimony whatever which tends to prove that the accused was actually or constructively present when that assemblage did take place. Indeed, the contrary is most apparent. With respect to admitting proof of procurement to establish a charge of actual presence, the court is of opinion that, if this be admissible in England on an indictment for levying war, which is far from being conceded, it is admissible only by virtue of the operation of the common law upon the statute, and therefore is not admissible in this country unless by virtue of a similar operation; a point far from being established, but on which, for the present, no opinion is given. If, however, this point be established, still the procurement must be proved in the same manner, and by the same kind of

testimony, which would be required to prove actual presence.

The second point in this division of the subject is the necessity of adducing the record of the previous conviction of some one person who committed the fact alleged to be treasonable.

This point presupposes the treason of the accused, if any has been committed, to be accessorial in its nature. Its being of this description, according to the British authorities, depends on the presence or absence of the accused at the time the fact was committed. The doctrine on this subject is well understood, has been most copiously explained, and need not be repeated. That there is no evidence of his actual or legal presence is a point already discussed and decided. It is, then, apparent that, but for the exception to the general principle which is made in cases of treason, those who assembled at Blennerhassett's Island, if that assemblage was such as to constitute the crime, would be principals, and those who might really have caused that assemblage, although, in truth, the chief traitors, would, in law, be accessories.

Proof requisite if alleged treason of accused be accessorial in its nature.

It is a settled principle in the law that the accessory cannot be guilty of a greater offense than his principal. The maxim is, *accessorius sequitur naturam sui principalis*; the accessory follows the nature of his principal. Hence results the necessity of establishing the guilt of the principal before the accessory can be tried. For the degree of guilt which is incurred by counseling or commanding the commission of a crime depends upon the actual commission of that crime. No man is an accessory to murder unless the fact has been committed.

In felonies guilt of principal must be established before accessory can be tried.

The fact can only be established in a prosecution against the person by whom a crime has been perpetrated. The law supposes a man more capable of
Idem. defending his own conduct than any other person, and will not tolerate that the guilt of A. shall be established in a prosecution against B. Consequently, if the guilt of B. depends on the guilt of A., A. must be convicted before B. can be tried. It would exhibit a monstrous deformity, indeed, in our system, if B. might be executed for being accessory to a murder committed by A., and A. should afterwards, upon a full trial, be acquitted of the fact. For this obvious reason, although the punishment of a principal and accessory was originally the same, and although in many instances it is still the same, the accessory could in no case be tried before the conviction of his principal, nor can he yet be tried previous to such conviction, unless he requires it, or unless a special provision to that effect be made by statute.

If, then, this was a felony, the prisoner at the bar could not be tried until the crime was established by the conviction of the person by whom it was actually perpetrated.

Is the law otherwise in this case, because in treason all are principals?

Let this question be answered by reason and by authority.

Why is it that in felonies, however atrocious, the trial
Law the same in cases of treason. of the accessory can never precede the conviction of the principal? Not because the one is denominated the principal, and the other the accessory, for that would be ground on which a great law principle could never stand. Not because there was

in fact a difference in the degree of moral guilt, for in the case of murder committed by a hardy villain for a bribe, the person plotting the murder and giving the bribe is perhaps of the two the blacker criminal; and were it otherwise this would furnish no argument for precedence in trial.

What, then, is the reason?

It has been already given. The legal guilt of the accessory depends on the guilt of the principal, and the guilt of the principal can only be established in a prosecution against himself.

Does not this reason apply in full force to a case of treason?

The legal guilt of the person who planned the assemblage on Blennerhassett's Island depends not simply on the criminality of the previous conspiracy, but on the criminality of that assemblage. If those ^{Idem.} who perpetrated the fact be not traitors, he who advised the fact cannot be a traitor. His guilt, then, in contemplation of law, depends on theirs, and their guilt can only be established in a prosecution against themselves. Whether the adviser of this assemblage be punishable with death as a principal or as an accessory, his liability to punishment depends on the degree of guilt attached to an act which has been perpetrated by others, and which, if it be a criminal act, renders them guilty also. His guilt, therefore, depends on theirs, and their guilt cannot be legally established in a prosecution against him.

The whole reason of the law, then, relative to the principal and accessory, so far as respects the order of trial, seems to apply in full force to a case of treason committed by one body of men in conspiracy with others who are absent.

If from reason we pass to authority, we find it laid down by Hale, Foster, and East, in the most explicit terms, that the conviction of some one who has committed the treason must precede the trial of him who has advised or procured it. This position is also maintained by Leach, in his notes on Hawkins, and is not, so far as the court has discovered, anywhere contradicted.

These authorities have been read and commented on at such length that it cannot be necessary for the court to bring them again into view. It is the less necessary, because it is not understood that the law is controverted by the counsel for the United States.

It is, however, contended that the prisoner has waived his right to demand the conviction of some one person who was present at the fact, by pleading to his indictment.

Had this indictment even charged the prisoner according to the truth of the case, the court would feel some difficulty in deciding that he had by implication waived his right to demand a species of testimony essential to his conviction. The court is not prepared to say that the act which is to operate against his rights did not require that it should be performed with a full knowledge of its operation. It would seem consonant to the usual course of proceeding in other respects, in criminal cases, that the prisoner should be informed that he had a right to refuse to be tried until some person who committed the act should be convicted, and that he ought not to be considered as waiving the right to demand the record of conviction, unless, with the full knowledge of that right, he consented to be tried. The court, however, does not

Burr did not waive any rights by pleading to the indictment.

decide what the law would be in such a case. It is unnecessary to decide it, because pleading to an indictment, in which a man is charged as having committed an act, cannot be construed to waive a right which he would have possessed had he been charged with having advised the act. No person indicted as a principal can be expected to say, I am not a principal, I am an accessory; I did not commit, I only advised, the act.

The authority of the English cases on this subject depends in a great measure on the adoption of the common-law doctrine of accessorial treasons. If that doctrine be excluded, this branch of it may not be directly ap-

The overt act of procuring the treasonable assemblage ought to have been charged in the indictment.

pllicable to treasons committed within the United States. If the crime of advising or procuring a levying of war be within the constitutional definition of treason, then he who advises or procures it must be indicted on the very fact; and the question, whether the treasonableness of the act may be decided in the first instance in the trial of him who procured it, or must be decided in the trial of one who committed it, will depend upon the reason, as it respects the law of evidence, which produced the British decisions with regard to the trial of principal and accessory, rather than on the positive authority of those decisions.

This question is not essential in the present case, because, if the crime be within the constitutional definition, it is an overt act of levying war, and, to produce a conviction, ought to have been charged in the indictment.

The law of the case being thus far settled, what ought to be the decision of the court on the present motion? Ought the court to sit and hear testimony which cannot affect the prisoner,

Question of the admissibility of testimony considered.

or ought the court to arrest that testimony? On this question much has been said; much that may, perhaps, be ascribed to a misconception of the point really under consideration. The motion has been treated as a motion confessedly made to stop relevant testimony; and in the course of the argument it has been repeatedly stated by those who oppose the motion, that irrelevant testimony may and ought to be stopped. That this statement is perfectly correct is one of those fundamental principles in judicial proceedings which is acknowledged by all, and is founded in the absolute necessity of the thing. No person will contend that in a civil or criminal case either party is at liberty to introduce what testimony he pleases, legal or illegal, and to consume the whole term in details of facts unconnected with the particular case. Some tribunal, then, must decide on the admissibility of testimony. The parties cannot constitute this tribunal, for they do not agree. The jury cannot constitute it, for the question is, whether they shall hear the testimony or not. Who, then, but the court can constitute it? It is of necessity the peculiar province of the court to judge of the admissibility of testimony. If the court admit improper or reject proper testimony, it is an error of judgment; but it is an error committed in the direct exercise of their judicial functions.

The present indictment charges the prisoner with levying war against the United States, and alleges an overt act of levying war. That overt act must be proved, *Idem.* according to the mandates of the Constitution and of the act of Congress, by two witnesses. It is not proved by a single witness. The presence of the accused has been stated to be an essential component part of the overt act in this indictment, unless the common-law

principle respecting accessories should render it unnecessary; and there is not only no witness who has proved his actual or legal presence, but the fact of his absence is not controverted. The counsel for the prosecution offer to give in evidence subsequent transactions, at a different place, and in a different State, in order to prove — what? The overt act laid in the indictment? That the prisoner was one of those who assembled at Blennerhassett's Island? No, that is not alleged. It is well known that such testimony is not competent to establish such a fact. The Constitution and law require that the fact should be established by two witnesses, not by the establishment of other facts from which the jury might reason to this fact. The testimony, then, is not relevant. If it can be introduced, it is only in the character of corroborative or confirmatory testimony, after the overt act has been proved by two witnesses in such manner that the question of fact ought to be left with the jury. The conclusion, that in this state of things no testimony can be admissible, is so inevitable that the counsel for the United States could not resist it. I do not understand them to deny that, if the overt act be not proved by two witnesses so as to be submitted to the jury, all other testimony must be irrelevant, because no other testimony can prove the act. Now an assemblage on Blennerhassett's Island is proved by the requisite number of witnesses, and the court might submit it to the jury whether that assemblage amounted to a levying of war; but the presence of the accused at that assemblage being nowhere alleged, except in the indictment, the overt act is not proved by a single witness, and, of consequence, all other testimony must be irrelevant.

The only difference between this motion as made, and

the motion in the form which the counsel for the United States would admit to be regular, is this. It is now general for the rejection of all testimony. It might be particular with respect to each witness as adduced. But can this be wished, or can it be deemed necessary? If enough is proved to show that the indictment cannot be supported, and that no testimony, unless it be of that description which the attorney for the United States declares himself not to possess, can be relevant, why should a question be taken on each witness?

Question as to the admissibility of testimony further considered.

The opinion of this court on the order of testimony has frequently been adverted to as deciding this question against the motion.

If a contradiction between the two opinions does exist the court cannot perceive it. It was said that levying war is an act compounded of law and fact, of which the jury, aided by the court, must judge.

Levying war is act compounded of law and fact to be judged by jury with aid of court.

To that declaration the court still adheres.

It was said that, if the overt act was not proved by two witnesses, no testimony in its nature corroborative or confirmatory was admissible, or could be relevant.

If overt act not proved by two witnesses, no corroborative testimony admissible.

From that declaration there is certainly no departure. It has been asked, in allusion to the present case, if a general commanding an army should detach troops for a distant service, would the men composing that detachment be traitors, and would the commander-in-chief escape punishment?

Let the opinion which has been given answer this question.

Appearing at the head of an army would, according to this opinion, be an overt act of levying war; detaching a military corps from it for military purposes might also be an overt act of levying war. It is not pretended that he would not be punishable for these acts; it is only said that he may be tried and convicted on his own acts in the State where those acts were committed, not on the acts of others in the State where those others acted.

Much has been said, in the course of the argument, on points on which the court feels no inclination to comment particularly, but which may, per- Conclusion.
haps, not improperly receive some notice.

That this court dares not usurp power is most true.

That this court dares not shrink from its duty is not less true.

No man is desirous of placing himself in a disagreeable situation. No man is desirous of becoming the peculiar subject of calumny. No man, might he let the bitter cup pass from him without self-reproach, would drain it to the bottom. But if he has no choice in the case; if there is no alternative presented to him but a dereliction of duty, or the opprobrium of those who are denominated the world, he merits the contempt as well as the indignation of his country, who can hesitate which to embrace.

That gentlemen, in a case the most interesting, in the zeal with which they advocate particular opinions, and under the conviction in some measure produced by that zeal, should on each side press their arguments too far, should be impatient at any deliberation in the court, and should suspect or fear the operation of motives to which alone they can ascribe that deliberation, is, perhaps, a frailty incident to human nature; but if any conduct on

the part of the court could warrant a sentiment that they would deviate to the one side or the other from the line prescribed by duty and by law, that conduct would be viewed by the judges themselves with an eye of extreme severity, and would long be recollected with deep and serious regret.

The arguments on both sides have been intently and deliberately considered. Those which could not be noticed, since to notice every argument and authority would swell this opinion to a volume, have not been disregarded. The result of the whole is a conviction, as complete as the mind of the court is capable of receiving on a complex subject, that the motion must prevail.

No testimony relative to the conduct or declarations of the prisoner elsewhere and subsequent to the transaction on Blennerhassett's Island can be admitted; because such testimony, being in its nature merely corroborative, and incompetent to prove the overt act in itself, is irrelevant, until there be proof of the overt act by two witnesses.

This opinion does not comprehend the proof by two witnesses that the meeting on Blennerhassett's Island was procured by the prisoner. On that point the court, for the present, withholds its opinion, for reasons which have been already assigned; and as it is understood, from the statements made on the part of the prosecution, that no such testimony exists. If there be such, let it be offered, and the court will decide upon it.

The jury have now heard the opinion of the court on the law of the case. They will apply that law to the facts, and will find a verdict of guilty or not guilty, as their own consciences may direct.

NOTE.

On September 1, 1807, the jury returned the following verdict: "We of the jury say that Aaron Burr is not proved to be guilty under this indictment by any evidence submitted to us. We therefore find him not guilty." After some discussion by counsel "the court decided that the verdict should remain as found by the jury; and that an entry should be made on the record of 'not guilty.'"¹

The interest in Burr, like that in the authorship of Junius, possesses all the vitality of an unsolved mystery. It is debated now just as it was debated a hundred years ago whether his real scheme was treasonable as comprising a separation of the West or Southwest from the Union, or merely a filibustering design against Mexico, or both, and it still is mysterious. Henry Adams in his *History*, after a careful examination, thinks it was both.² Mr. McCaleb³ in a work just published, upon a full review of all accessible and some new data, concludes that it was filibustering only. It is not probable that the question will ever be conclusively settled. Very likely the exact and final scope of the enterprise was not determined in Burr's own mind. Weighing the evidence, which is wholly circumstantial, it seems to us probable that the real object was, or at least at the time its execution was entered upon came to be, primarily an enterprise against Mexico looking to its subjugation or conquest, and, contingently, an enterprise against the United States,—that contingency depending upon success in Mexico, and the public sentiment in the West and the then condition of affairs in the United States. It can, however, confidently be affirmed that it was so destitute of the chances of a favorable issue as to be Quixotic.

¹ Robertson, *Shorthand Report of Trial*, vol. 2, pp. 446, 447. Accounts of the Trial of Burr will be found in Flanders' *Lives of the Chief Justices*, II, 419 *et seq.* (Ed. 1875); Van Santvoord, *Lives of the Chief Justices*, 384 *et seq.*; Kennedy, *Life of Wirt*, I, chs. XIII-XIV; Parton, *Life of Burr*, chs. XX-XXVI; Carson, *Hist. Supreme Court*, 215. Jefferson's letters in 1806 and 1807 contain many references to Burr's operations and to the trial before Chief Justice Marshall.

² *History of the United States*.

³ *The Aaron Burr Conspiracy*, by Walter Flavins McCaleb, N. Y. 1903.

In a note to Andrews' Edition of the Works of James Wilson, vol. II, page 422, the editor says:

"The professional reader will not fail to observe the change which has taken place in the nature and elements of treason. These changes have been the natural and logical consequences of discarding the feudal notion of allegiance, which is the personal tie between the subject and the sovereign, and the substitution of obedience to the law and obligation to maintain the government, wherein is seen an entire departure from the old notions of allegiance. Treason, therefore, consists of some overt act indicative of the intent to obstruct or destroy the government. Levying war, adhering to enemies or giving them comfort are acts of treason.

"The courts had occasion in the early days of the Republic to examine into the new notions of treason. Among the most noted trials are Bollman and Swartwout, reported in 4 Cranch's U. S. Reports. In the argument of these cases our author's views as above set forth are cited. These cases grew out of the Burr treason cases, and Marshall's celebrated charge in Burr's case is reported in the appendix to 4 Cranch's U. S. Reports.

"In these cases and the cases therein cited will be found the new ideas in relation to treason, levying of war, and the necessity of some overt act, that is the destruction of the English idea of constructive treason." See Story on the Constitution, III, §§ 1790-1796; Tucker's Constitution of the United States, II, pp. 619-621.

Circuit decisions referred to by Chief Justice Marshall: In 1799, John Fries and others were charged with having committed a treasonable insurrection in the counties of Bucks and Northampton, Pennsylvania, in forcibly resisting the execution of two acts of Congress providing for the levying and collection of a direct tax within the United States. The indictment charged that the defendant, with more than a hundred other persons, armed and arrayed in warlike manner, with guns, etc., did traitorously assemble and combine to oppose and prevent by intimidation and violence the execution of the said laws, thereby, as it was alleged, levying war against the United States. The first trial of Fries was before Justice Iredell, of the Supreme Court. There was

a mistrial, and a second trial was had in April, 1800, before Justice Chase, Associate Justice of the Supreme Court, and Richard Peters, District Judge of the United States.

In 1795 an insurrection took place in the four western counties of Pennsylvania with a view of resisting and preventing by force the execution of certain statutes of Congress of 1791-1792, which imposed duties on distilled spirits. Phillip Vigol and John Mitchell were indicted for treason for levying war against the United States by resisting and preventing by force the execution of said Acts of Congress. They were tried before Justice Paterson, Associate Justice of the Supreme Court. The cases of Vigol and Mitchell and Justice Paterson's opinions and rulings are reported in 2 Dallas, 346 and 348. It was there held by Mr. Justice Paterson that an insurrection to prevent by force and intimidation the execution of an Act of Congress is treason and constitutes levying war against the United States.

When the case of Fries came on for the second trial before Justice Chase and Judge Peters, the prisoner being in the box, Justice Chase stated, in substance, that he and Judge Peters agreed with Justices Paterson and Iredell as to the law of treason as laid down in the Vigol and Mitchell cases, but to prevent unnecessary delay and to save time, and to prevent a delay of justice in the great number of civil cases pending for trial at that time, the court had drawn up in writing their opinion of the law arising on the overt acts stated in the indictment against Fries, and had directed the clerk to deliver copies of the opinion, one to the District Attorney, one to the counsel for the prisoner, and one to the petit jury. When the copy was handed to William Lewis, an eminent lawyer and one of the prisoner's counsel, he was very indignant. Mr. Lewis testified on the Chase impeachment trial: "The clerk handed me the paper which was designed for the prisoner's counsel. If I took hold of it, I am certain I did not read it. My impression is that I waved my hand and used these words: 'I will never suffer my hand to be corrupted with a prejudged opinion in any case, much less so in a capital one.'"

Mr. Lewis and Mr. Dallas consulted and agreed to de-

cline to appear for Fries any further in the case, and Mr. Dallas testified that when Mr. Lewis refused to receive the opinion, he remembered to have heard Judge Peters say to Judge Chase: "I told you so; I knew they would take the stud."

Mr. Lewis and Mr. Dallas consulted with their client in prison and Mr. Dallas testifies on this point:

"In the evening of that day Mr. Lewis and myself visited Fries at the prison. We stated to him that we had two objects in view: the first, that of saving his life; and the second, to maintain our privileges as members of the bar. We told him that under the then existing circumstances we had no hopes of an acquittal, as there were no doubts as to the facts, and the court having made up their opinion as to the law, and the jury having heard the declaration of the court which would influence their verdict; and we told him if he would consent to our withdrawal from the defense and would refuse to accept other counsel, it would be a strong recommendation to the President for a pardon. He appeared at first extremely alarmed, but after some time he agreed to our proposition. We told him at the same time that if he insisted on it, we would proceed to defend him at every hazard."

Afterwards Justice Chase and Judge Peters endeavored to have the counsel, Mr. Lewis and Mr. Dallas, resume their connection with the case and defend the prisoner, but they declined to do so. On this point, Mr. Dallas testified:

"Judge Chase said we might think to embarrass the court, but we should find ourselves mistaken. He then asked Fries if he wished other counsel assigned him. The prisoner replied he did not know what was best for him to do, but he would leave it entirely to the court. Judge Chase then observed that 'by the blessing of God they would do him as much justice as the counsel who had been assigned him.'"

Fries was thereupon tried without being defended by counsel. The charge of Judge Chase to the jury laid down the law of treason as it had been laid down in the Vigol and Mitchell cases above referred to, stating, among other things: "It is the opinion of the court that any insurrection arising from any body of people in the

United States attempting to obtain or effect by force and violence any object of a public nature or of general or national concern, is a levying of war against the United States within the contemplation of the Constitution;" leaving it to the jury to decide whether the purpose and intention of the defendants in doing what they did was treasonable.

Largely for this alleged misconduct in handing down an opinion under the circumstances briefly detailed, four years afterwards (1804) Judge Chase was impeached by the House of Representatives of high crimes and misdemeanors.

The opinions of Paterson, Iredell and Chase on the subject of treason in the above mentioned cases are those which are referred to and reviewed by Chief Justice Marshall in his opinion in the Burr case. See also cases reported in 2 Dallas; Trial of Samuel Chase, by Charles Evans, Appendix, p. 7 *et seq.* As to Fries case, see also "Forum," by David Paul Brown, I, 353.

In the Introduction to the John Marshall Memorial, I, xxxi *et seq.*, Judge Dillon comments on the issuance of a subpoena *duces tecum* to President Jefferson in the Burr trials, and, among other things, says: "None of Marshall's rulings on these celebrated trials [of Aaron Burr] is questioned except the one awarding writs of subpoena *duces tecum* addressed to President Jefferson commanding him to appear at the court in Richmond and produce certain designated letters of General Wilkinson to the President, which Burr stated on oath might be material to his defense. . . . The legality or propriety of Marshall's orders granting subpoenas to the Executive head of the Government to appear in court as a witness or to appear and produce letters or documents has been the subject of controversy among lawyers from that time to the present, and different opinions thereon are expressed in the addresses here published. . . .

"My own studies and reflections upon the subject have led me to the following conclusions:

"1. No 'such divinity doth hedge' the President that by virtue of his office he is, in criminal cases, totally exempt from judicial process requiring his attendance as a

witness. In the absence of controlling legislation, a court in such cases has the power, agreeably to the rules and usages of law, to issue to him a subpoena generally to appear as a witness, or a subpoena *duces tecum* to produce a material and relevant document in his possession.

"Such was the express decision of Chief Justice Marshall in Burr's case; and accordingly he awarded, on Burr's application, a subpoena *duces tecum* directed to President Jefferson, then in Washington, requiring him to appear and produce at the trial in Richmond certain designated letters and documents in his possession or under his control, which the defendant stated under oath might be material to his defense.

"The substantial ground of the criticism of Marshall's action in subpoenaing the President is the imputed absolute independence, personal and official, of the Executive of any control by a co-ordinate department, and the inability of the court to enforce against the President obedience to the writ by proceedings for contempt,—the argument being that the want of ability to enforce the writ demonstrates the want of power to issue it. These were Jefferson's views. He stated them distinctly in his letters to District Attorney Hay, and he directed that officer to communicate them to the court. In an unofficial letter to the same officer he clearly intimated that he would resist by force, as an invasion of the Executive province, any attempt on the part of the Judiciary to compel his personal attendance at Richmond, and thereby withdraw him from the exercise of his functions.

"The decision of the Chief Justice as to the power of the court, and, on a proper showing by the defendant, the duty of the court to issue the writ, seems to me to be correct.

"2. Respecting the power and duty of the court upon the return of the writ, no certain rules, in the absence of legislation, can be laid down.

"In the two opinions on this subject given by the Chief Justice on the Burr trials he reserved all such questions until the return of the process. He said: 'In no case of this kind would the court be required to proceed against the President as against an ordinary individual.' 'I cannot precisely lay down any general rule for such a case.' And he added: 'Perhaps the court ought to

consider the reasons which would induce the President to refuse to exhibit such a letter as conclusive on it, unless such letter could be shown to be absolutely necessary in the defense. . . . Had the President, when he transmitted the letter [of November 12, 1806, to the District Attorney, Hay], subjected it to certain restrictions, and stated that in his judgment the public interest required certain parts of it to be kept secret, and had accordingly made a reservation of them, all proper respect would have been paid to it; but he has made no such reservation. This must be decided by himself, not by another for him. '

"The trials for treason and misdemeanor broke down by reason of the failure of the Government's evidence to show that the defendant committed the offenses laid in the indictments at any place within the jurisdiction of the court, and the letters of General Wilkinson were not offered or used on the trials; and no further rulings were made by the court on the subject of the letters or of the respective powers of the President and the court."

The editor is permitted to give the following interesting letter from Mr. Justice Shiras, of the Supreme Court of the United States, bearing on the power of the judiciary to issue subpoenas *duces tecum* to the chief executive officer of a State or the Nation:

PITTSBURG, June 13, 1903.

HON. JOHN F. DILLON:

My Dear Judge:—The validity and effect of a subpoena from a court, addressed to the Governor of a State or to the President of the United States, was considered by the Supreme Court of Pennsylvania, in *Appeal of Gov. Hartranft*, 4th Norris, 85 Penn. 433.

A majority of that court held that, where such a writ had been sued out and served on the Governor of the State, it was a sufficient return if the Atty. Genl. of the State, appearing in the court, *argued* that such a functionary ought not, as a matter of law, to be called upon to make any return to such a writ—that it was enough to show that the writ was served upon one who occupied the position of Governor of the State. A minority, speaking through Agnew, Chief Justice, held that the

proper course of the Governor, in such a case, was either to obey the behest of the writ by appearing in the court, or to make a return that affairs of State prevented him from leaving the seat of government, or that the subject of the inquiry in the court was of such a character as to affect the welfare of the State in such a way that, *in his judgment*, he ought not to be subjected to examination in a court of law. Such a return as the latter would exonerate the Governor from an attachment for disobeying the writ, but that a mere allegation that the person named in the writ was the Governor would not so exonerate him.

It would seem to me that the view of C. J. Agnew (who was, as you doubtless know, a jurist of high repute) was the sound one, and was the view of C. J. Marshall in the Burr case. However, as that was my contention as counsel in the Pennsylvania case, it may be that my judgment is biased by that circumstance.

Very truly yours,

GEORGE SHIRAS, JR.

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FEDERAL JURISDICTION OVER CORPORATIONS.

The next case — *The Bank v. Deveaux* — is important and interesting as being the first case that came before the Supreme Court of the United States involving the question whether under the Judiciary Article of the Constitution (art. III, sec. 2) the Federal courts could be invested by Congress in any case with jurisdiction over corporations, and if so whether the Judiciary Act (sec. 11) did confer such jurisdiction in the case before the court. Neither the Constitution nor the Judiciary Act mentions "corporations," "citizens" only are mentioned, and the jurisdiction of the Federal court on this ground was limited by the Judiciary Act to a case where "the suit is between a *citizen* of the State where the suit is brought and a *citizen* of another State" (sec. 11). The case of *The Bank v. Deveaux* presented the question whether a private corporation — the Bank — could bring an original suit in the Federal court. The Supreme Court held that a corporation *per se* was not a "citizen," but also held that it represented citizens, and that in fact and in law the suit was between persons suing in their corporate character and the individual defendant. On this ground the jurisdiction of the Federal courts over corporations could only be maintained where *all* the members were citizens of one State or of some State other than that of the defendant. This narrow view remained unshaken for years, and it had the necessary effect of depriving the Federal courts in almost every instance of any jurisdiction over corporations, by whose

agency the great business enterprises of the country had at length come to be carried on.

The view taken by Chief Justice Marshall in the opinion in *The Bank v. Deveaux* was subsequently modified to the effect that "a suit by or against a corporation in its corporate name may be presumed to be a suit by or against citizens of the State which created the corporate body, and no averment or denial to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of a court of the United States."¹

The result thus finally reached was doubtless essential to carry out the full purpose of the Constitution in providing for a Federal judiciary, but the serious difficulties arising out of the word "citizen" in the Constitution in reaching that result are among the most impressive illustrations of the important part which fiction plays in the development of every system of jurisprudence.²

It was not easy to hold directly that "a corporation was a citizen," but it is in effect so held by the fiction which the court has adopted that *all* of the shareholders or members of a corporation are *conclusively* presumed to be citizens of the State which created the corporation, a presumption which in most instances is directly contrary to the fact.

The Supreme Court has since held that the word "person" in the Fourteenth Amendment of the Constitution included "corporations." On the like principles the court might have held that a corporation was a juristic person or citizen of the State that created it, and as such was a citizen within the meaning and purpose of the

¹ *The Ohio & Mississippi Railroad Company v. Wheeler*, 1 Black, U. S. Supreme Court Reports, 286.

² *Curtis, Jurisdiction of the United States Courts*, ch. V.

Constitution and Judiciary Act; but that result was in the course of judicial evolution reached in a more easy and indirect way, by the adoption of the fiction above stated.

The opinion of the Chief Justice, aside from its importance, has the added interest of being the first of the cases in the Supreme Court which dealt with the difficult subject of Federal judicial power over corporations, and as being one of the very few instances in which the views or opinions of Chief Justice Marshall were modified if not overruled, which in this instance was done with his concurrence.

The Bank of the United States v. Deveaux and Others.

February Term, 1809.

[5 Cranch's Reports, 61-92.]

The propositions of law decided in this case are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

Whether a corporation aggregate can be sued in the courts of the United States depends upon the citizenship of its members.

The charter of the Bank of the United States does not enable that bank to sue in the courts of the United States.

The facts in the case were as follows:

In 1805 the State of Georgia passed a law taxing a branch bank of the United States at Savannah. The Bank of the United States was established under an Act

of Congress.¹ The tax was not paid, and the State officers entered the bank and seized \$2,000 in money. The bank sued Deveaux, the State officer who authorized the entry and also the one who made the entry, in trespass, before the United States Circuit Court for the District of Georgia. The declaration contained in averment was that the plaintiffs "are citizens of the State of Pennsylvania, and that the said Deveaux and Robinson are citizens of the State of Georgia." The defendants pleaded to the jurisdiction of the court that the body corporate which brought the action was not competent to sue in a Federal court. To this plea to the jurisdiction the plaintiffs demurred, and the court gave judgment in favor of the defendants, sustaining the plea. The case came in due course of law to the Supreme Court of the United States,²

¹ 1 Statutes at Large, 191, chapter 10, approved February 25, 1791.

That Congress has power to incorporate a bank and establish branches in the States, see *McCulloch v. Maryland*, 4 Wheat. 316, and the opinion of Chief Justice Marshall therein contained in this volume. As to the power of the States to tax banks established by Congress, see same case and also *post*, opinion of Marshall, Chief Justice, in *Osborn v. Bank of the United States*, 9 Wheat. 738.

Inasmuch as in this case the plaintiff bank was chartered by the Act of Congress, no reason is perceived why, under the later decisions of the Supreme Court, the plaintiff being a Federal corpora-

² The court was constituted as follows:

JOHN MARSHALL, <i>Chief Justice</i> .	
SAMUEL CHASE,	} <i>Associate Justices</i> .
BUSHROD WASHINGTON,	
WILLIAM JOHNSON,	
BROCKHOLST LIVINGSTON,	

Justice Livingston, having an interest in the question, gave no opinion.

Horace Binney, R. G. Harper and Mr. Ingersoll appeared for the plaintiffs.

P. B. Key and Walter Jones appeared for the defendants.

which decided the two questions stated in the opinion of the court, which was delivered by Chief Justice Marshall.

MARSHALL, Chief Justice. Two points have been made in this cause.

1. That a corporation, composed of citizens of one State, may sue a citizen of another State in the Federal courts.

2. That a right to sue in those courts is conferred on this bank by the law which incorporates it.

The last point will be first considered.

The judicial power of the United States, as defined in the Constitution, is dependent, 1st. On the nature of the case; and 2d. On the character of the parties.

By the judicial act, the jurisdiction of the Circuit Courts is extended to cases where the constitutional right to plead and be impleaded in the courts of the Union depends on the character of the parties; but where that right depends on the nature of the case, the Circuit Courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same State, claiming lands under grants from different States.

Unless, then, jurisdiction over this cause has been given to the Circuit Court by some other than the judicial act, the Bank of the United States had not a right to sue in that court, upon the principle that the case arises under a law of the United States.

tion, the Federal courts did not have jurisdiction on the ground of subject-matter, irrespective of the citizenship of the parties. See *Pacific Railroad Removal Cases*, 115 U. S. Supreme Court Reports. 1, and cases in the Supreme Court there cited. *Post*, p. 512.

Jurisdiction of Circuit Court under the Judiciary Act.

Unless jurisdiction is given by some other than the judicial act, the Circuit Court has no jurisdiction.

The plaintiffs contend that the incorporating act confers this jurisdiction.

That act creates the corporation, gives it a capacity to make contracts and to acquire property, and enables it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever."

This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to appear, as a corporation, in any court which would by law have cognizance of the cause, if brought by individuals. If jurisdiction is given by this clause to the Federal courts, it is equally given to all courts having original jurisdiction, and for all sums, however small they may be.

But the ninth article of the seventh section of the act furnishes a conclusive argument against the construction for which the plaintiffs contend. That section subjects the president and directors, in their individual capacity, to the suit of any person aggrieved by their putting into circulation more notes than is permitted by law, and expressly authorizes the bringing of that action in the Federal or State courts.

Ninth article of seventh section furnishes a conclusive argument against plaintiffs' construction.

This evinces the opinion of Congress that the right to sue does not imply a right to sue in the courts of the Union, unless it be expressed. This idea is strengthened also by the law respecting patent rights. That law expressly recognizes the right of the patentee to sue in the Circuit Courts of the United States.

The court, then, is of opinion that no right is conferred on the bank, by the act of incorporation, to sue in the Federal courts.

2. The other point is one of much more difficulty.

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of different States," both parties must be citizens to come within the description.

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and consequently cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be exercised in their corporate name. If the corporation be considered as a mere faculty, and not as a company of individuals who in transacting their joint concerns may use a legal name, they must be excluded from the courts of the Union.

The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The Constitution, therefore, and the law are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

A Constitution, from its nature, deals in generals, not in details. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

Constitution deals in
generals, not in de-
tails.

The judicial department was introduced into the American Constitution under impressions and with views which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the States will administer justice, as impartially as those of

the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States. Aliens, or citizens of different States, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provision, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the suit may be instituted. Substantially and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the Constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those decisions are not cited

This court has repeatedly decided causes between a corporation and an individual.

as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different State from the defendant, to sue in the national courts. It is by a course of acute,

metaphysical, and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken.

As our ideas of a corporation, its privileges, and its disabilities, are derived entirely from the English books, we resort to them for aid in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible, and incorporeal. Yet when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.

American ideas concerning corporations derived from English books.

The statute of Henry VIII. concerning bridges and highways enacts that bridges and highways shall be made and repaired by the "*inhabitants* of the city, shire, or riding," and that the justices shall have power to tax every "*inhabitant* of such city," etc., and that the collectors may "distrain every such inhabitant as shall be taxed and refuse payment thereof, in his lands, goods, and chattels."

Statute of Henry VIII.

Under this statute those have been construed inhabitants who hold lands within the city where the bridge to be repaired lies, although they reside elsewhere.

Lord Coke says, "Every corporation and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute."

Lord Coke cited.

The tax is not imposed on the person, whether he be a member of the corporation or not, who may happen to reside on the lands; but is imposed on the corporation itself; and consequently this ideal existence is considered

as an inhabitant when the general spirit and purpose of the law requires it.

In the case of *The King v. Gardner*, reported by Cowper, a corporation was decided by the court of the King's Bench to come within the description of "occupiers or inhabitants." In that case the poor-rates, to which the lands of the corporation were declared to be liable, were not assessed to the actual occupant, for there was none, but to the corporation. And the principle established by the case appears to be, that the poor-rates, on vacant ground belonging to a corporation, may be assessed to the corporation, as being inhabitants or occupiers of that ground. In this case Lord Mansfield notices and overrules an inconsiderate dictum of Justice Yates, that a corporation could not be an inhabitant or occupier.

These opinions are not precisely in point; but they serve to show that, for the general purposes and objects of a law, this invisible, incorporeal creature of the law may be considered as having corporeal qualities.

Incorporeal creature
may have corporeal
qualities.

It is true that, as far as these cases go, they serve to show that the corporation itself, in its incorporeal character, may be considered as an inhabitant or an occupier; and the argument from them would be more strong in favor of considering the corporation itself as endowed for this special purpose with the character of a citizen, than to consider the character of the individuals who compose it as a subject which the court can inspect, when they use the name of the corporation for the purpose of asserting their corporate rights. Still, the cases show that this technical definition of a corporation does not uniformly circumscribe its capacities, but that courts for

legitimate purposes will contemplate it more substantially.

There is a case, however, reported in 12 Modern Reports, which is thought precisely in point. The corporation of London brought a suit against Wood, by their corporate name, in the mayor's court.

Mayor and Commonalty v. Wood.

The suit was brought by the mayor and commonalty, and was tried before the mayor and aldermen. The judgment rendered in this cause was brought before the court of King's Bench, and reversed, because the court was deprived of its jurisdiction by the character of the individuals who were members of the corporation.

In that case the objection that a corporation was an invisible, intangible thing, a mere incorporeal, legal entity in which the characters of the individuals who composed it were completely merged, was urged and was considered.

Court may look beyond the corporate name and notice the character of the individuals.

The judges unanimously declared that they could look beyond the corporate name, and notice the character of the individuals. In the opinions which were delivered *seriatim*, several cases are put which serve to illustrate the principle and fortify the decision.

The case of The Mayor and Commonalty v. Wood is the stronger because it is on the point of jurisdiction. It appears to the court to be a full authority for the case now under consideration. It seems not possible to distinguish them from each other.

Above case on all-fours with one under consideration.

If, then, the Congress of the United States had in terms enacted that incorporated aliens might sue a citizen, or that the incorporated citizens of one State might sue a citizen of another State, in the Federal courts, by

their corporate name, this court would not have felt itself justified in declaring that such a law transcended the Constitution.

The controversy is substantially between aliens, suing by a corporate name, and a citizen, or between citizens of one State, suing by a corporate name, and those of another State. When these are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person, capable of being a citizen or an alien, who has the whole legal estate in himself. At law he is the real proprietor, and he represents himself, and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.

If the Constitution would authorize Congress to give the courts of the Union jurisdiction in this case, in consequence of the character of the members of the corporation, then the judicial act ought to be construed to give it. For the term "citizen" ought to be understood as it is used in the Constitution, and as it is used in other laws; that is, to describe the real persons who come into court, in this case, under their corporate name.

That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the registering act. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.

Corporations composed of citizens are considered as citizens by the Legislature.

The court feels itself authorized, by the case in 12 Mod-

ern Reports, on a question of jurisdiction, to look to the character of the individuals who compose the corporation; and they think that the precedents of this court, though they were not decisions on argument, ought not to be absolutely disregarded.¹

If a corporation may sue in the courts of the Union, the court is of opinion that the averment in this case is sufficient.

Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

Judgment reversed, plea in abatement overruled and cause remanded.

NOTE

"A much-controverted question here arises: Is a corporation created by a State a citizen within the meaning of these jurisdictional clauses? It is very obvious that a corporation is not a citizen in the true primal sense of that term. It is a metaphysical entity, a creature of the law, distinct from the personality of all its corporators. A citizen, in the true sense of the term, is a human being, with personal rights and capable of personal privileges and immunities; but it was held in an early case [*Bank v. Deveaux*] that the reason of the jurisdictional clause of the Constitution applied to the cases of the corporations of different States. The reason that jurisdiction was given between citizens of different States to the United States courts was the apprehension that the State courts, in such controversies, might not be as impartial as a court of the United States. The State court depends for its authority upon the State creating it; its environments consist of the nature, feeling and sympathies of

¹ "The rule has now taken the form of a legal fiction. For while a suit by or against a corporation is considered to be brought by or against its members, they are conclusively presumed, for purposes of jurisdiction, to be citizens of the State in which the body was incorporated." Kent Com. (12th Ed.), I, *347. See *ante*, p. 167.

the people of the State. A United States court is created by the Constitution of the Union, and in its independence of State authority and separation from State influence would be a better tribunal for the trial of questions in which the rights of the stranger were involved. This reason for the jurisdiction where the parties were citizens is stronger where one of the parties is a corporation; if the stranger citizen might be prejudiced in a State court, *a fortiori* might a stranger corporation be. Then again it was easy to see that the corporation, which was a being of the law and not a personality, yet represented persons who would likely be citizens of the State which created it. While, therefore, in form it was a corporation, a legal entity, and not a person representing persons who were citizens of the States which created it, the reason of the rule led to the early decisions that a corporation of a State was to be regarded, for jurisdictional purposes, as if it were the body of the incorporators who were citizens of the same State. This view was strongly stated by Chief Justice Marshall in the case of *Bank of the United States v. Deveaux*." Tucker, Const. of U. S., II, 793, 794.

The decision in the case of *Bank of the United States v. Deveaux* has been overruled or modified, and it is now the well established rule that for Federal jurisdictional purposes a corporation is conclusively presumed to be a citizen of the State which created it, and this is true also whether all the members of the corporation are citizens of the State or not, and the presumption that all the members are citizens of the incorporating State the court will not permit to be rebutted.¹

In a letter from Mr. Justice Story to Chancellor Kent of August 31, 1844, it appears that Chief Justice Marshall had become satisfied that the early decisions were wrong.² *Justice Horace Gray* in *Marshall Memorial*, I, 74.

He (Marshall) expounded the law of the Constitution without leaning one way or the other to accord to those general principles which usually govern the construction of fundamental laws. Thorpe, Const. Hist of U. S., II, 512.

¹ See Kent Com. (12th Ed.), I, *347 and note b; Curtis on Jurisdiction of United States Courts, chapter V. *Post*, p. 512.

² Referring to this case and the case of *The Bank of the United States v. Dandridge*, 12 Wheaton, 64.

***SANCTITY AND FORCE OF JUDGMENTS OF THE
FEDERAL COURTS—THEIR INVIOABILITY
BY THE STATES.***

One of the earliest and most impressive of Marshall's decisions establishing the principle of nationality is the case of the United States against Judge Peters, given in the year 1809. It is here held that the judgments of the courts of the United States in cases in which they have jurisdiction, or the rights which may be acquired under said judgments, cannot be interfered with or injuriously affected by action on the part of the States through State Legislatures or State tribunals, and that it belongs to the Federal tribunals and not to the States to determine whether the courts of the United States have jurisdiction of a cause under the Constitution and laws of the United States.

The United States v. Judge Peters.

February Term, 1809.

[5 Cranch's Reports, Appendix, 115-141.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

The Court of Appeals established by the Continental Congress had power to reverse the sentence of a State Court of Admiralty.

An act of a State Legislature cannot determine whether a court of the United States has jurisdiction.

It being suggested that a State was the owner of a fund proceeded against in the District Court, in admiralty, the claim of the State was examined, and this court having found that the State was not a necessary party, a peremptory *mandamus* to the District Judge, to proceed to adjudicate between the individual parties, was awarded.

The fact that a State has an interest in the subject-matter of a suit between individuals, which it may choose to assert, does not oust the courts of the United States of jurisdiction.

If such an interest is suggested as would make the State a necessary party, the suggestion must be examined, and its correctness determined by the court.

The United States District Court for the district of Pennsylvania gave, in a certain admiralty case, sentence in favor of Gideon Olmstead and others against Elizabeth Serjeant and Esther Waters. A copy of this sentence was served on said Serjeant and Waters, which they refused to obey. Judge Peters of the District Court was then applied to for a process which should enforce obedience, but this he would not grant. At the February term of 1808 the Supreme Court was applied to for a rule to the said judge, requiring him to show cause why a *mandamus* should not issue commanding him to grant the desired process. He made a return stating that the Legislature of Pennsylvania had passed an act to protect Elizabeth

Statement of facts.

Serjeant and Esther Waters against the process of any United States court issued under the suits in question, that he was unwilling to embroil the United States with Pennsylvania, and refused to grant the process in order to bring the case before the Supreme Court. Serjeant and Waters were the executrixes of Rittenhouse, referred to below.

On the 20th of February, 1809, Chief Justice Marshall delivered the opinion of the court.¹

Opinion. MARSHALL, Chief Justice. With great attention, and with serious concern, the court has considered the return made by the judge for the district of Pennsylvania to the *mandamus* directing him to execute the sentence pronounced by him in the case of Gideon Olmstead and others *v.* Rittenhouse's Executrixes, or to show cause for not so doing. The cause shown is an act of the Legislature of Pennsylvania, passed subsequent to the rendition of his sentence. This act authorizes and requires the Governor to demand, for the use of the State of Pennsylvania, the money which had been decreed to

¹ The court was constituted as follows:

JOHN MARSHALL, <i>Chief Justice.</i>	
WILLIAM CUSHING,	} <i>Associate Justices.</i>
SAMUEL CHASE,	
BUSHROD WASHINGTON,	
WILLIAM JOHNSON,	
BROCKHOLET LIVINGSTON,	

Justice Brockholst Livingston was appointed during the recess, in place of William Paterson, deceased.

Justice William Cushing was absent on account of illness.

At this term C. A. Rodney, Attorney-General, William Lewis and F. S. Key, of counsel for Olmstead and others, submitted the return of the *mandamus* to the consideration of the court without argument. John Serjeant for defendants.

Gideon Olmstead and others, and which was in the hands of the executrices of David Rittenhouse; and in default of payment to direct the Attorney-General to institute a suit for the recovery thereof. This act further authorizes and requires the Governor to use any further means he may think necessary for the protection of what it denominates "the just rights of the State," and also to protect the persons and properties of the said executrices of David Rittenhouse, deceased, against any process whatever issued out of any Federal court in consequence of their obedience to the requisition of the said act.

If the Legislatures of the several States may at will annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania, not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

Deplorable results if
State Legislatures
may annul judgments
of United States courts.

The act in question does not, in terms, assert the universal right of the State to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence the execution of which it prohibits was rendered in a cause over which the Federal courts have no jurisdiction.

If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the Constitution in the several State Legislatures, then this act concludes

the subject; but if that power necessarily resides in the supreme judicial tribunal of the Nation, then the jurisdiction of the District Court of Pennsylvania over the case in which that jurisdiction was exercised ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.

In the early part of the war between the United States and Great Britain, Gideon Olmstead
How the case arose. and others, citizens of Connecticut, who say they had been carried to Jamaica as prisoners, were employed as part of the crew of the sloop *Active*, bound from Jamaica to New York, and laden with a cargo for the use of the British army in that place. On the voyage they seized the vessel, confined the captain, and sailed for Egg Harbor. In sight of that place the *Active* was captured by the Convention, an armed ship belonging to the State of Pennsylvania, brought into port, libeled, and condemned as prize to the captors. From this sentence Gideon Olmstead and others, who claimed the vessel and cargo, appealed to the Court of Appeals established by Congress, by which tribunal the sentence of condemnation was reversed, the *Active* and her cargo condemned as prize to the claimants, and process was directed to issue out of the Court of Admiralty, commanding the marshal of that court to sell the said vessel and cargo and pay the net proceeds to the claimants.

The mandate of the appellate court was produced in the inferior court, the judge of which admitted the general jurisdiction of the court established by Congress, as
Idem. an appellate court, but denied its power to control the verdict of a jury which had been rendered in favor of the captors, the officers and crew of

the Convention; and therefore refused obedience to the mandate; but directed the marshal to make the sale, and, after deducting charges, to bring the residue of the money into court, subject to its future order.

The claimants then applied to the judges of appeals for an injunction to prohibit the marshal from paying the money arising from the sales into the Court of Admiralty; which was awarded, and served upon him; in contempt of which, on the 4th of January, 1778, he paid the money to the judge, who acknowledged the receipt thereof at the foot of the marshal's return.

On the first of May, 1799, George Ross, the judge of the Court of Admiralty, delivered to David Rittenhouse, who was then treasurer of the State of Pennsylvania, the sum of £11,496 9s. 9d. in loan-office certificates, which was the proportion of the prize-money to which that State would have been entitled had the sentence of the Court of Admiralty remained in force. On the same day David Rittenhouse executed a bond of indemnity to George Ross, in which, after reciting that the money was paid to him for the use of the State of Pennsylvania, he binds himself to repay the same, should the said George Ross be thereafter compelled, by due course of law, to pay that sum according to the decree of the Court of Appeals.

History of the case.

These loan-office certificates were in the name of Matthew Clarkson, who was marshal of the Court of Admiralty, and were dated the 6th of November, 1778. Indents were issued on them to David Rittenhouse, and the whole principal and interest were afterwards funded by him, in his own name, under the act of Congress making provision for the debt of the United States.

Among the papers of David Rittenhouse was a memo-

randum, made by himself at the foot of a list of the certificates mentioned above, in these words: "Note.

Idem. The above certificates will be the property of the State of Pennsylvania, when the State releases me from the bond I gave, in 1778, to indemnify George Ross, Esq., judge of the admiralty, for paying the fifty original certificates into the treasury, as the State's share of the prize."

The State did not release David Rittenhouse from the bond mentioned in this memorandum. These certificates remained in the private possession of David Rittenhouse, who drew the interest on them during his life, and after his death they remained in possession of his representatives, against whom the libel in this case was filed, for the purpose of carrying into execution the decree of the Court of Appeals.

While this suit was depending, the State of Pennsylvania forbore to assert its title, and in January, 1803, the court decreed in favor of the libelants; soon after which the Legislature passed the act which has been stated.

It is contended that the Federal courts were deprived of jurisdiction in this cause by that amendment of the Constitution which exempts States from being sued in those courts by individuals. This amendment declares, "that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The right of a State to assert, as plaintiff, any interest it may have in a subject which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this

Contention is that Federal courts are deprived of jurisdiction by XI Amendment.

The fact that State has an interest in subject-matter of suit between individuals does not oust the courts of the United States of jurisdiction.

amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides that no suit shall be commenced or prosecuted against a State. The State cannot be made defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. In this case the suit was not instituted against the State or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the Court of Admiralty which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it was unnecessary to give an opinion; but it certainly can never be alleged that a mere suggestion of title in a State to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.

If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificates in question was vested in the State of Pennsylvania.

By the highest judicial authority of the Nation it has been long since decided that the Court of Appeals erected by Congress had full authority to revise and correct the sentences of the Courts of Admiralty of the several States in prize causes. That question, therefore, is at rest. Consequently, the decision of the Court of Appeals in this case annulled the sentence of

Court of Appeals established by the Continental Congress had power to reverse a sentence of a State Court of Admiralty.

the Court of Admiralty, and extinguished the interest of the State of Pennsylvania in the Active and her cargo which was acquired by that sentence. The full right to that property was immediately vested in the claimants, who might rightfully pursue it, into whosoever hands it might come. These certificates, in the hands, first, of Matthew Clarkson, the marshal, and afterwards of George Ross, the judge of the Court of Admiralty, were the absolute property of the claimants. Nor did they change their character on coming into the possession of David Rittenhouse.

Although Mr. Rittenhouse was treasurer of the State of Pennsylvania, and the bond of indemnity which he executed states the money to have been paid to him for the use of the State of Pennsylvania, it is apparent that he held them in his own right, until he should be completely indemnified by the State. The evidence to this point is conclusive. The original certificates do not appear to have been deposited in the State Treasury, to have been designated in any manner as the property of the State, or to have been delivered over to the successor of David Rittenhouse. They remained in his possession. The indents, issued upon them for interest, were drawn by David Rittenhouse, and preserved with the original certificates. When funded as part of the debt of the United States, they were funded by David Rittenhouse, and the interest was drawn by him. The note made by himself at the foot of the list which he preserved, as explanatory of the whole transaction, demonstrates that he held the certificates as security against the bond he had executed to George Ross; and that bond was obligatory, not on the State of Pennsylvania, but on David Rittenhouse, in his private capacity.

These circumstances demonstrate, beyond the possibility of doubt, that the property which represented the Active and her cargo was in possession, not of the State of Pennsylvania, but of David Rittenhouse, as an individual; after whose death it passed, like other property, to his representatives.

Since, then, the State of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the District Court was pronounced, and since the suit was neither commenced nor prosecuted against that State, there remains no pretext for the allegation that the case is within that amendment of the Constitution which has been cited; and consequently, the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order, which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory *mandamus* must be awarded.

NOTE

"The State Legislatures cannot annul the judgments, nor determine the extent of the jurisdiction, of the courts of the Union. This was attempted by the Legislature of Pennsylvania, and declared to be inoperative and void by the Supreme Court of the United States, in the case of the *United States v. Peters*." Kent, Com. (12th Ed.), I, *409.

The material facts of the case down to the decision of the Supreme Court appear in Chief Justice Marshall's opinion. After that decision the further history of the case is thus summarized by Judge Hopkinson: "A decree was given by the District Court (Judge Richard

mind of John Marshall, the court no longer approached constitutional questions with the old-time caution, and in a long series of decisions asserted its own jurisdiction, upheld the powers of Congress, and set aside laws of the States which in its opinion conflicted with the Federal Constitution. Between 1809, when Marshall handed down his decision in the *Olmstead* case (*United States v. Peters*), and 1824, when that of the *Bank of the United States v. The Planters' Bank of Georgia* was decided, fourteen acts of eleven States were set aside wholly or in part." McMaster, *Hist. of People of the U. S.*, V, 412, and note; Miller, *Const. of U. S.*, 46, note 1, 127.

REFERENCES TO UNITED STATES *v.* JUDGE PETERS, IN
MARSHALL MEMORIAL.

Among his other greatest judgments are *United States against Peters*, on the sanctity of judgments of the courts of the United States. *Justice Horace Gray*, I, 70.

The want of a strong national sentiment is seen in the adoption of the Constitution by the narrow majority of three in the New York Convention, ten in the Virginia Convention, and nineteen in the Massachusetts Convention, after the most strenuous labors of its advocates, and under the pressure brought about by the annihilation of public credit, the threatened paralysis of commerce, and the impending dissolution of the Confederation. It is shown in bitterly denouncing as unconstitutional abuses of power Washington's proclamation of neutrality in 1793 on the outbreak of the war between England and the French Republic, and the ratification of Jay's treaty with England in 1795. It is exhibited in the case of the *United States v. Peters*, where the Governor of Pennsylvania ordered out a brigade of militia to obstruct the service of a Federal writ. "Not a year went by," says McMaster,¹ "but one or more States bade defiance to the Federal Government." *Judge Le Baron Colt*, I, 388.

In the opposition expressed in the Philadelphia Convention to establishing United States courts of inferior jurisdiction, and in the suggestion that the enforcement of the Federal Constitution and laws should be confided to the State courts, he (Marshall) detected a disposition to emasculate the Federal judiciary by making it a body without limbs, and when occasion arose in 1809 he issued that

¹ *Hist. of People of U. S.*, V, 417. For a full history of the facts in this cause see McMaster, *Hist. of People of U. S.*, V, 403-406.

"General Michael Bright, commanding a brigade of the militia of Pennsylvania, received orders from the Governor immediately to have in readiness such a portion of the militia under his command as might be necessary to execute the orders, and to employ them to protect and defend the persons and property of the representatives of Mr. Rittenhouse from and against any process founded on the decree of the District Court of the United States. A guard was accordingly placed by General Bright at the houses of these ladies, and he, with the other defendants in the indictment, opposed, with force, the efforts of the marshal to serve the writ issued to him. The process, however, was served, and the State relieved the ladies, not by waging war upon the United States, but by paying the money according to the judgment of the court.

"This is enough of the history of this interesting case for our present object. It was for this resistance to the process of a court of the United States that General Bright, and others of his party, were indicted and brought to trial before Judges Washington and Peters, holding a Circuit Court of the United States."¹

"The State court and State cannot interfere with the proceeding and judgments of the United States courts." Tucker, Const. of U. S., II, 801.

"When the war passed away and peace returned, the struggle for State rights took on the form of a contest with the Supreme Court. Dominated by the master

¹ From Judge Hopkinson's Eulogy upon Justice Washington, quoted in "The Forum," by David Paul Brown, I, pp. 375-377, where a graphic account is given of the trial of General Bright by Judge Bushrod Washington, who "it was publicly proclaimed would never dare to charge against the defendants." See also synopsis of case by Henry Hitchcock in Constitutional History, etc., p. 84, published by G. P. Putnam's Sons, 1889. See also Carson's accurate account and interesting comments on this case as illustrating the growth of Federal power: History of the Supreme Court U. S., pp. 46, 54, 218. "The real defendant was the State of Pennsylvania, which, by express legislative act in 1803, had not only claimed the fund to which the controversy related, but, relying upon the Eleventh Amendment, expressly denied the jurisdiction of the Federal court and the validity of its judgment, and required the Governor to resist its execution." Carson, p. 635, 215 and note; Trial of General Bright in U. S. Circuit Court; Report by Richard Peters, Jr., 1809; "The whole proceedings in the case of Olmstead v. Rittenhouse, Phila. 1809; U. S. v. Peters, 5 Cranch, 115 (1809); Ross et al., Executors, v. Rittenhouse, 2 Dallas, 160 (1812); Journals of Continental Congress, vol. 5, p. 372."

***THE CONSTITUTION OF THE UNITED STATES
FORBIDS A STATE FROM IMPAIRING ITS
OWN CONTRACTS OR GRANTS OF PROPERTY
BY SUBSEQUENT LEGISLATION.***

The next case—*Fletcher v. Peck*—decides several most interesting questions, but its eminent feature is the holding that the prohibition in the Constitution of the United States that “no State shall pass any law impairing the obligation of contracts” applies to the State itself and prohibits the State from impairing contracts made with itself, whether the contracts are executory or executed. Accordingly the title to lands patented under an act of the Legislature of Georgia cannot be impaired by a subsequent act of the Legislature of that State. The case of *Fletcher v. Peck* is a fitting precursor to the *Dartmouth College* case and in material respects anticipated its leading doctrine.

Fletcher v. Peck.

February Term, 1810.

[6 Cranch's Reports, 87-148.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of *Decisions of the Supreme Court of the United States*:

- . If a court of law can in any case inquire into the motives of members of the Legislature for voting for a law, it cannot do so collaterally in a suit between individuals to which the State is not a party.

Before a law can be pronounced unconstitutional its incompatibility with the Constitution must be clear. Contracts made by a State are within the Constitution of the United States.

When a law is a contract a repeal of that law cannot take away rights vested under that contract.

A grant implies a contract by the grantor not to reassert the title granted.

So a grant made in pursuance of a contract is an executed contract, and its obligations cannot be impaired by a law of a State.

If a Legislature make a grant of lands in fee simple, a subsequent Legislature cannot take away the title of a *bona fide* purchaser for a valuable consideration from the first grantee, upon the ground that the grant to the latter was fraudulent.

By the Constitution of Georgia of 1789, the Legislature had power to dispose of the unappropriated lands within its limits.

An averment in a declaration, that the Legislature had no authority to convey, is not answered by a plea that the Governor had authority to convey.

By consent, pleadings were amended in this court, and the cause again heard on the amended pleadings.

The lands in question, in this case, did belong to the State of Georgia, and not to Carolina, or the United States.

An unextinguished Indian title to these, was not absolutely inconsistent with a seisin in fee by the State.

On the 7th of January, 1795, the Legislature of Georgia passed an act authorizing a patent to issue to a company called "The Georgia Com-

Facts in the case.

pany," for a certain tract of land within the limits of

that State; which patent was regularly issued on the 13th of that month. This land passed from hand to hand, until on the 14th of May, 1803, Peck, the defendant in this action, conveyed by deed to Fletcher, the plaintiff, fifteen thousand acres of the original tract, lying undivided therein. Peck in this deed covenanted that Georgia, at the time her patent issued, was legally the owner in fee of the land in question, subject only to the extinguishment of the Indian title; that the Legislature of Georgia had good right to sell the same; that the title given by Georgia had been legally conveyed to Peck, and that this title had been "in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent Legislature of the said State of Georgia." Fletcher, however, alleged that the Legislature of Georgia had no right to sell the tract in question; that the members of the Georgia Company had promised members of the Legislature, that, if they would vote for the act authorizing the patent to issue, they should have a share in the lands, by which, he alleged, the act was made of no avail, and so the title of the State of Georgia had never passed to Peck. And he alleged, further, that the Legislature of Georgia, on the 13th of February, 1796, for the reason above stated, annulled the act granting a patent to the Georgia Company. He also alleged that on the 7th of January, 1795, the United States, and not Georgia, owned the lands in question.

Fletcher sued Peck in the Circuit Court of the United States for the district of Massachusetts, when all of the facts above related were alleged in the pleadings; judgment went against the plaintiff, however, who brought up the case before the Supreme Court.

In the following opinion of the court,¹ so many of the facts in the case are stated, that, with the statement given above, it will be intelligible without a detail of minor points.

MARSHALL, Chief Justice. The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict. Opinion.

The suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which History of the case. were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the Legislature of that State.

The first count in the declaration sets forth a breach in the second covenant contained in the deed. The covenant is, "that the First count in the declaration. Legislature of the State of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said

¹ The court was constituted as follows:

JOHN MARSHALL, <i>Chief Justice.</i>	
WILLIAM CUSHING,	
SAMUEL CHASE,	
BUSHROD WASHINGTON,	
THOMAS TODD,	
WILLIAM JOHNSON,	
BROCKHOLST LIVINGSTON,	
}	<i>Associate Justices.</i>

Justices Cushing and Chase were absent on account of ill health.

The plaintiff sued out his writ of error and the case was twice argued, first by Luther Martin for plaintiff in error, and by John Quincy Adams and R. G. Harper for the defendant, at February term, 1809, and again at this term by Luther Martin for the plaintiff and by R. G. Harper and Joseph Story for the defendant.

act." The breach assigned is that the Legislature had no power to sell.

The plea in bar sets forth the Constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff were within that State. It then sets forth the granting act, and avers the power of the Legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the Legislature of Georgia, unless restrained by its own Constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such a manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer for the consideration of the court, is this: Did the then Constitution of the State of Georgia prohibit the Legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the Constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such that the judge feels a clear and

Legislature of Georgia has power of disposing of the unappropriated lands within its limits.

Question whether a law is repugnant to the Constitution is a delicate one.

strong conviction of their incompatibility with each other.¹

In this case the court can perceive no such opposition. In the Constitution of Georgia, adopted in the year 1789, the court can perceive no restriction on the legislative power which inhibits the passage of the act of 1795. The court cannot say that, in passing that act, the Legislature has transcended its powers, and violated the Constitution.

Act of 1795 not repugnant to the Constitution of Georgia.

In overruling the demurrer, therefore, to the first plea, the Circuit Court committed no error.

The third covenant is, that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The second count assigns, in substance, as a breach of this covenant, that the original grantees from the State of Georgia promised and assured divers members of the Legislature, then sitting in general assembly, that, if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said State by virtue of such law; and that divers of said members, to whom the said promises were made, were unduly influenced thereby, and under such influence did vote for the passing of the said bill; by reason whereof

The second count.

¹ This delicate duty of the judicial department has led to the rule now well established, that the court usurps legislative functions when it presumes to adjudge a law void where the repugnancy between the law and Constitution is not established beyond reasonable doubt. *Tucker on Const. of U. S.*, I, 877.

the said law was a nullity, etc.; and so the title of the State of Georgia did not pass to the said Peck, etc.

The plea to this count, after protesting that the promises it alleges were not made, avers that, until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the Legislature of the State of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

That corruption should find its way into the governments of our infant republics and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would in any case be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired under that contract by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded that an act of the supreme sovereign power might be de-

On corruptions in Legislature: how far may a court be competent to vacate a contract.

clared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind ^{Idem.} be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the Nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the Legislature be corrupted, it may well be doubted whether it be within the province of the judiciary to control their conduct; and if less than a majority act from impure motives, the principle ^{Idem.} by which judicial interference would be regulated is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the State of Georgia to annul the contract, nor does it appear to the court, by this count, that the State of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this: One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed and assigns as a breach that some of the members of the Legislature were induced to vote in favor of the law which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

On the pleading this is a case upon a private contract between two individuals.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent in the extreme, upon a private contract between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act which the Legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity in consequence of the impure motives which influenced certain members of the Legislature which passed the law.

The solemn question of corruption cannot be brought up collaterally or incidentally.

The Circuit Court therefore did right in overruling this demurrer.

The fourth covenant in the deed is, that the title to the premises has been in no way constitutionally or legally impaired by virtue of any subsequent act of any subsequent Legislature of the State of Georgia.

Fourth covenant.

The third count recites the undue means practised on certain members of the Legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent Legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. The count proceeds to recite at large this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

The third count.

After protesting as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

Defendant pleads purchaser without notice.

To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions presented by these pleadings are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and others, the original grantees, by the conveyance of the Governor, made in pursuance of an act of Assembly to which the Legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the Legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

Lands vested absolutely in James Gunn.

The Legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power, which must find its vindication in a train of reasoning not often heard in courts of justice.

A party cannot pronounce its own deed invalid.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

It is, however, to be recollected that the people can act only by these agents, and that while within the

powers conferred on them, their acts must be considered as the acts of the people. If the agents be corrupt, others may be chosen; and if their contracts be examinable, the common sentiment as well as common usage of mankind points out a mode by which this examination may be made, and their validity determined.

If the Legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the Legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was in its nature a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he acquired it,

Rights of third parties
in suit to set aside conveyance for fraud.

of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the Legislature, whatever might have been its decision as respected the original grantees, would have been bound by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration. Idem.

If the Legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may divest any other individual of his lands, if it shall be the will of the Legislature so to exert it.

It is not intended to speak with disrespect of the Legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant as are alleged against this may not again exist, yet the principle on which alone this rescinding act is to be supported may be applied to every case to which it shall be the will of any Legislature to apply it. The principle is this: that a Legislature may by its own act divest the

No disrespect intended
toward the Georgia
Legislature.

vested estate of any man whatever, for reasons which shall by itself be deemed sufficient.

In this case the Legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation, so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee simple to the grantees, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that guilt which infected the original transaction. Their case is not distinguishable

Purchasers of a legal estate without notice of fraud a case in point.

from the ordinary case of purchasers of a legal estate, without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title was the same with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the Legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one Legislature is competent to repeal any act which a former Legislature was competent to pass, and that one Legislature cannot abridge the powers of a succeeding Legislature.¹

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding Legislature cannot

¹ Marshall did not (where the law is a contract) adopt the English principle as to Acts of Parliament. See Bl. Com., Book I, c. 11, p. 186.

undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

Rights vested under a contract law cannot be divested by repeal of said law.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation?¹

To the Legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the Legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the Constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might be doubted, were Georgia a single sovereign power. But

¹ On this point see Chief Justice Chase in the *Legal Tender Cases*, 12 Wall. 581, and Justice Miller in *Loan Ass'n v. Topeka*, 20 Wall. 655.

Georgia cannot be viewed as a single, unconnected, sovereign power, on whose Legislature no other restrictions are imposed than may be found in its own Constitution. She is a part of a large empire; she is a member of the American Union; and that Union has a Constitution, the supremacy of which all acknowledge, and which imposes

limits to the Legislatures of the several States, which none claim a right to pass. The Constitution of the United States declares that "no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."¹

Does the case now under consideration come within this prohibitory section of the Constitution?

In considering this very interesting question we immediately ask ourselves, What is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the Governor. A contract executed is one in which the object of contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature,

Contract defined; various kinds of contracts.

A grant implies a contract on part of grantor not to reassert the title granted.

¹ It is remarkable that this very important clause was passed over almost without comment during the discussions preceding the adoption of that instrument (the Constitution of the United States) It is but twice alluded to in the papers of The Federalist, in Nos. 7 and 44. Cooley, Const. Lim. 273, 274.

amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is therefore always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the Constitution uses the general term "contracts," without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the Constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the Constitution, while an absolute conveyance remained unprotected.

A grant is an executed contract.

"Contracts" under the Constitution construed to comprehend both kinds of contracts

If, under a fair construction of the Constitution, grants¹ are comprehended under the term "contracts," is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

Construction.

The words themselves contain no such distinction.²

¹See Von Holst on Const. Law of U. S., 232, 233.

²"A private corporation, whether civil or eleemosynary, is a contract between the Government and the corporators; and the Legislature cannot repeal, impair or alter the rights and privileges conferred by the charter against the consent and without the

They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the ^{Idem.} framers of the Constitution viewed with some apprehension the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

“No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.”

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.¹

default of the corporation, judicially ascertained and declared.” Kent, Com. (12th Ed.), II, *306.

This principle was settled in the case of *Dartmouth College v. Woodward*, 4 Wheaton, 518, nine years later, and declared and asserted by the Supreme Court in various cases prior to that great decision. In the *Dartmouth College* case, Justice Story even went so far as to say that “Grants of property and of franchises, coupled with an interest, to public or political corporations, are beyond legislative control, equally as in the case of the property of private corporations.” *Post*, pp. 299-338.

¹For a full exposition of the subject of bills of attainder and bills of pains and penalties, see *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 338.

In this form the power of the Legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter?

The State Legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in ^{*Ex post facto* law defined.} which it was not punishable when it was committed.¹ Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The Legislature is, then, prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared by some previous law to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the Legislature the power of seizing, for public use, the estate of an individual, in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making this distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he purchased. This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

¹ This definition is distinguished for its comprehensive brevity and precision, and it extends to laws passed after the act, and affecting a person by way of punishment of that act, either in his person or estate. Kent, Com. (12th Ed.), I, *409. See also Tucker on Const. of the United States, II, 655.

The argument in favor of presuming an intention to except a case, not excepted by the words of the Constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The Constitution as passed gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract was suable in the courts of the United States for that violation. Would it have been a defense in such a suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defense could be set up. And yet, if a State is neither restrained by the general principles of our political institutions, nor by the words of the Constitution, from impairing the obligation of its own contracts, such a defense would be a valid one. This feature is no longer found in the Constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court that in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.¹

In overruling the demurrer to the third plea, therefore, there is no error.

¹ The case of *Fletcher v. Peck* first brought this prohibitory clause into direct discussion. Kent, Com. (12th Ed.), I, *418; Miller on the Const. 555.

The first covenant in the deed is that the State of Georgia, at the time of the act of the Legislature thereof, entitled as aforesaid, was legally seized in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon.

The fourth count assigns as a breach of this covenant, that the right to the soil was in the United States, and not in Georgia.

To this count the defendant pleads that the State of Georgia *was seized*; and tenders an issue on the fact, in which the plaintiff joins. On this issue a special verdict is found.

The jury find the grant of Carolina by Charles Second to the Earl of Clarendon and others, comprehending the whole country from 36 degrees, 30 minutes, north latitude, to 29 degrees, north latitude, and from the Atlantic to the South Sea.¹

They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35th degree of north latitude was the boundary line between North and South Carolina.

That seven of the eight proprietors of the Carolinas surrendered to George Second, in the year 1729, who appointed a governor of South Carolina.

That in 1732 George the Second granted to the Lord Viscount Percival and others seven-eighths of the territory between the Savannah and the Alatamaha, and extending west to the South sea; and that the remaining eighth part, which was still the property of the heir of Lord Carteret, one of the original grantees of Carolina, was

¹ For a full discussion of "Title by Discovery" see case of *Johnson v. McIntosh*, 8 Wheaton, 548.

afterwards conveyed to them. This territory was constituted a colony and called Georgia.

That the governor of South Carolina continued to exercise jurisdiction south of Georgia.

That in 1752 the grantees surrendered to the Crown.

That in 1754 a governor was appointed by the Crown, with a commission describing the boundaries of the colony.

That a treaty of peace was concluded between Great Britain and Spain, in 1763, in which the latter ceded to the former Florida, with Fort St. Augustin and the bay of Pensacola.

That in October, 1763, the King of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida, and Grenada, and prescribing the bounds of each; and further declaring that all the lands between the Alatamaha and St. Mary's should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the Crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters.

That in November, 1763, a commission was issued to the governor of Georgia, in which the boundaries of that province are described as extending westward to the Mississippi. A commission describing boundaries of the same extent was afterwards granted in 1764.

That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace acknowledging them as sovereign and independent States.

That in April, 1787, a convention was entered into be-

tween the States of South Carolina and Georgia, settling the boundary line between them.

The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that State and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposition. They contend that the reservation for the use of the Indians Point made by plaintiff. contained in the proclamation of 1763 excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war, it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular State.

The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be in itself doubtful, the commissions subsequent thereto, which were given to the governors of Georgia, entirely remove the doubt.

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate States, was a momentous question, which, at one time, threatened to shake the American confederacy

to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court that the particular land stated in the declaration appears, from this special verdict, to lie within the State of Georgia, and that the State of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant and of the pleadings. It was doubted whether a State can be seized in fee of lands subject to the Indian title, and whether a decision that they were seized in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the state.¹

Judgment affirmed, with costs.

NOTE

Congress have the exclusive right to pre-emption to all Indian lands lying within the territory of the United States. This doctrine was laid down in the case of *Fletcher v. Peck* and *Johnson v. M'Intosh* (8 Wheaton, 543).

Marshall's views as to the nature of the Indian title have never been departed from. See *Cherokee Nation*

¹ This was the language of the majority of the court. It was a mere naked declaration, without any discussion or reasoning by the court in support of it. Kent, Com. (12th Ed.), III, *378.

Justice Johnson dissented on two points in this case, one of them being the above. He held that the Indian nations were absolute proprietors of the soil.

v. State of Georgia, 5 Peters, 1; *United States v. Cook*, 19 Wallace, 591.

The distinguishing feature of *Fletcher v. Peck* is that a State is bound equally with natural persons and cannot impair its sales of property by subsequent legislation any more than an individual can defeat a sale of property by his own acts. Miller on Const. of U. S. 556. See also *Life of John Marshall* by Allan B. Magruder, 187-190; Van Santvoord, *Lives of Chief Justices*, 361; *State of New Jersey v. Wilson*, 7 Cranch, 164; *Dartmouth College Case*, *infra*, and notes.

REFERENCES TO FLETCHER *v.* PECK, IN MARSHALL MEMORIAL.

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THE ADMIRALTY AND MARITIME JURISDICTION OF THE FEDERAL COURTS UNDER THE CONSTITUTION AND THE CRIMES ACT OF 1790.

United States v. Bevans.

February Term, 1818.

[3 Wheaton's Reports, 337-391.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

The article of the Constitution which describes the judicial power, and extends it to cases of admiralty and maritime jurisdiction, does not make a cession of territory or of general jurisdiction, so as to vest in the United States the shores of the sea below low-water mark.

By the eighth section of the Crimes Act of April 30, 1790, Congress has not conferred jurisdiction on the Circuit Court to try an indictment for a murder committed on board a ship of war lying in the harbor of Boston, within the jurisdiction of the State of Massachusetts.

Bevans was a marine on board the United States ship Independence; and while this ship was
Facts in the case. lying in Boston harbor, within the limits wherein the process of the courts of Massachusetts had always been served, he killed the cook's mate of said

ship. He was tried for this act before the United States Circuit Court for the district of Massachusetts and found guilty. A motion for a new trial was then made; but the judges of that court being opposed in opinion as to the case being within their jurisdiction, it was brought to the Supreme Court for decision.

The opinion of the court¹ was delivered on the 21st of February, as follows:

MARSHALL, Chief Justice. The question proposed by the Circuit Court which will be first considered Opinion. is,—

Whether the offense charged in this indictment was, according to the statement of facts which accompanies the question, “within the jurisdiction or cognizance of the Circuit Court of the United States for the district of Massachusetts?”

Is this case as charged and by the facts properly within jurisdiction of the Circuit Court of the United States.

The indictment appears to be founded on the eighth section of the “Act for the punishment of certain crimes against the United States.” That section gives the courts of the Union cognizance of certain offenses committed on the high seas, or in any river, haven, basin, or bay out of the jurisdiction of any particular State.

¹The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

BROCKHOLST LIVINGSTON,

THOMAS TODD,

GABRIEL DUVAL,

JOSEPH STORY,

Associate Justices.

Mr. Webster appeared for the defendant.

Mr. Wheaton and Attorney-General William Wirt appeared for the United States.

Whatever may be the constitutional power of Congress, it is clear that this power has not been so exercised in this section of the act as to confer on its courts jurisdiction over any offense committed in a river, haven, basin, or bay, which river, haven, basin, or bay is within the jurisdiction of any particular State.

What, then, is the extent of jurisdiction which a State possesses?¹

We answer, without hesitation, the jurisdiction of a State is co-extensive with its territory;
Jurisdiction of a State defined. co-extensive with its legislative power.

The place described is unquestionably within the original territory of Massachusetts. It is, then, within the jurisdiction of Massachusetts, unless that jurisdiction has been ceded to the United States.

It is contended to have been ceded by that article in the Constitution which declares that "the judicial power shall extend to all cases of admiralty and maritime jurisdiction." The argument is, that the power thus granted is exclusive; and that the murder committed by the prisoner is a case of admiralty and maritime jurisdiction.
Defendant argues this is a case of admiralty and maritime jurisdiction.

Let this be admitted. It proves the power of Congress to legislate in the case; not that Congress has exercised that power. It has been argued, and the argument in favor of as well as that against the proposition deserves great consideration, that courts of common law have concurrent jurisdiction with courts of admiralty over murder committed in bays, which are inclosed parts of the sea; and that for this reason the offense is within the jurisdiction of Massachusetts. But in construing the act of Congress, the court believes it to be unnecessary

¹ Thorpe, Const. Hist. of U. S., II, 490.

to pursue the investigation which has been so well made at the bar respecting the jurisdiction of these rival courts.

To bring the offense within the jurisdiction of the courts of the Union, it must have been committed in a river, etc., out of the jurisdiction of any State. It is not the offense committed, but the bay in which it is committed, which must be out of the jurisdiction of the State. If, then, it should be true that Massachusetts can take no cognizance of the offense, yet, unless the place itself be out of her jurisdiction, Congress has not given cognizance of that offense to its courts.¹ If there be a common jurisdiction, the crime cannot be punished in the courts of the Union.

Location, not the nature of the offense, the guide as to jurisdiction.

Can the cession of all cases of admiralty and maritime jurisdiction be construed into a cession of the waters on which those cases may arise?²

This is a question on which the court is incapable of feeling a doubt. The article which describes the judicial power of the United States is not intended for the cession of territory or of general jurisdiction.

Article which describes judicial power of the United States not intended for the cession of territory or of general jurisdiction.

It is obviously designed for other purposes. It is in the eighth section of the second article we are to look for cessions of territory and of exclusive jurisdiction. Congress has power to exercise exclusive jurisdiction over this district, and over all places purchased, by the con-

¹ In the case of the *United States v. Wiltberger*, 5 Wheaton, 76, it was decided that the United States courts had no jurisdiction over the crime of manslaughter committed on board a vessel of the United States lying in a foreign harbor, because the act of Congress of April 30, 1790, ch. 9, sec. 12, did not reach such a case.

² Tucker on the Const. of U. S., II, 780.

sent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings.

It is observable that the power of exclusive legislation (which is jurisdiction) is united with cession of territory, which is to be the free act of the States. It is difficult to compare the two sections together without feeling a conviction, not to be strengthened by any commentary on them, that, in describing the judicial power, the framers of our Constitution had not in view any cession of territory, or, which is essentially the same, of general jurisdiction.

It is not questioned that whatever may be necessary to the full and unlimited exercise of admiralty and maritime jurisdiction is in the government of the Union.

The "necessary and proper" clause here brought up. Congress may pass all laws which are necessary and proper for giving the most complete effect to this power.¹ Still, the general jurisdiction over the place, subject to this grant of power, adheres to the territory, as a portion of sovereignty not yet given away. The residuary powers of legislation are still in Massachusetts. Suppose, for example, the power of regulating trade had not been given to the General Government. Would this extension of the judicial power to all cases of admiralty and maritime jurisdiction have divested Massachusetts of the power to regulate the trade of her bay? As the powers of the respective governments now stand, if two citizens of Massachusetts

¹ Tucker on Const. of the United States, II, 773. See *Waring v. Clark*, 5 How. 441, where the Supreme Court held that the admiralty jurisdiction was not limited or to be interpreted by the English admiralty rules. Why the English rule cannot be maintained in the United States is explained by Chief Justice Taney in the great and leading case of *The Genesee Chief*, 12 How. 443.

step into shallow water when the tide flows, and fight a duel, are they not within the jurisdiction and punishable by the laws of Massachusetts? If these questions must be answered in the affirmative, and we believe they must, then the bay in which this murder was committed is not out of the jurisdiction of a State, and the Circuit Court of Massachusetts is not authorized by the section under consideration to take cognizance of the murder which has been committed.

It may be deemed within the scope of the question certified to this court to inquire whether any other part of the act has given cognizance of this murder to the Circuit Court of Massachusetts?

The third section enacts, "that if any person or persons shall, within any fort, arsenal, dock-yard, magazine, or in any other Wording of the third section. place or district of country under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons, on being thereof convicted, shall suffer death."

Although the bay on which this murder was committed might not be out of the jurisdiction of Massachusetts, the ship of war on the deck of which it was committed is, it has been said, "a *place* within the sole and exclusive jurisdiction of the United States," whose courts may consequently take cognizance of the offense.

That a government which possesses the broad power of war, which "may provide and maintain a navy," which "may make rules for the government and regulation of the land and naval forces," has power to punish an offense committed by a marine on board a ship of war, wherever that ship may lie, is a proposition never to be

questioned in this court.¹ On this section, as on the eighth, the inquiry respects not the extent of the power of Congress, but the extent to which that power has been exercised.

The objects with which the word "*place*" is associated are all, in their nature, fixed and territorial. A fort, an arsenal, a dock-yard, a magazine, are all of this character. When the sentence proceeds with the words, "or in any other place or district of country under the sole and exclusive jurisdiction of the United States," the construction seems irresistible that by the words "other place" was intended another place of a similar character with those previously enumerated, and with that which follows. Congress might have omitted, in its enumeration, some similar place within its exclusive jurisdiction, which was not comprehended by any of the terms employed, to which some other name might be given; and therefore the words "other place" or "district of country" were added; but the context shows the mind of the Legislature to have been fixed on territorial objects of a similar character.

This construction is strengthened by the fact that, at the time of passing this law, the United States did not possess a single ship of war. It may therefore be reasonably supposed that a provision for the punishment of crimes in the navy might be postponed until some provision for a navy should be made. While taking this view of the subject, it is not entirely unworthy of remark that afterwards, when a navy was created, and Congress did proceed to make rules for its regulation and government, no jurisdiction is given to the courts of the United States of any crime committed in a ship of

¹ Tucker on Const. of U. S., II, 780, 800; Kent, Com. (12th ed.), I, 361.

war, wherever it may be stationed. Upon these reasons the court is of opinion that a murder committed on board a ship of war, lying within the harbor of Boston, is not cognizable in the Circuit Court for the district of Massachusetts; which opinion is to be certified to that court.

The opinion of the court on this point is believed to render it unnecessary to decide the question respecting the jurisdiction of the State court in the case.

NOTE.

The admiralty jurisdiction of the Federal courts has, by constructions placed upon it by those courts, received an immense increase in its extent. Down to 1851 it was held to be limited in fact to the seaboard, if not actually to the sea. It extended no further on the rivers than the tide ebbed and flowed. But the Supreme Court of the United States has since decided that it extended to all navigable streams; that it was a system of laws intended to have operation upon the interests of navigation; that whether it took place upon salt or fresh water was entirely immaterial, and that the Constitution of the United States, when it declared that the Federal courts should have jurisdiction in admiralty, meant that they should have jurisdiction in all that class of cases which heretofore have been called admiralty cases, whether they grew out of salt water transactions or of engagements and acts upon fresh water.

"The old opinion that the power extended only to tide water has been wholly abandoned. Wherever navigation exists in the United States, there this constitutional provision extends." *The Magnolia*, 20 How. 296, and *The Genesee Chief*, 12 How. 443. *Von Holst*, Const. Law of the United States, 218; s. p., Justice Gray in *Marshall Memorial*, I, 74, 75.

"This criminal jurisdiction of the admiralty is therefore exclusively vested in the National Government; and may be exercised over such crimes and offenses as Congress may, from time to time, delegate to the cognizance of the National courts." *Story*, Com., III, ch. xxxviii, § 1667.

**RESPECTIVE CONSTITUTIONAL POWERS OF
THE GENERAL AND STATE GOVERNMENTS
AS TO BANKRUPT AND INSOLVENT LAWS.
THE AUTHORITY OF THE STATES IS SUB-
JECT TO THE CONTRACT-CLAUSE OF THE
FEDERAL CONSTITUTION.**

The opinion in the next case — *Sturges v. Crowninshield* — has always been ranked as among the great judgments of Chief Justice Marshall. It has stood the test of time and the exact point decided has never been disturbed. It has all of Marshall's characteristics. Though it relates to a most delicate, interesting and complex subject, not a single authority is cited. Its reasonings are drawn from his own ample intellectual resources. The scope of the contract-clause of the Constitution (article 1, section 10), declaring that no State shall pass "any law impairing the obligation of contracts," is considered in all its aspects, historical and legal, and in connection with the bankruptcy-clause of the Constitution giving Congress the power (article 1, section 8) "to establish uniform laws on the subject of bankruptcies throughout the United States," and the conclusion is reached that although the States have authority to pass insolvent or even bankrupt laws in the absence of an act of Congress conflicting with such State laws, yet that this power of the States is subject to the limitation of the Federal Constitution that no State law shall impair the obligation of contracts, and State laws cannot, therefore, discharge the debtor from subsisting contracts.

The same difficult question came again before the court in Chief Justice Marshall's time in *Ogden v. Saunders*,¹ where a majority of the court held that this limitation on the power of the States did not apply as to contracts made *after* the enactment of the State law; but also held that such State laws even as to subsequent contracts could not affect the rights of creditors who are citizens of other States.

Mr. Phelps' comment on these cases will not fail to interest the reader. He says:

"It is to be remembered further that in only one of all those decisions did the majority of the court fail to concur with Marshall. In the case of *Ogden v. Saunders*, where the power of the States to pass bankrupt or insolvent laws was discussed, he was for the first and last time in the minority. Four of the judges—against the opinion of Judges Marshall, Story and Duvall—sustained the power of the States to pass such a law; but all concurred in the judgment in that case, which was that a discharge under such a law could not affect a creditor outside the jurisdiction who had not thought proper to appear and become a party to the proceeding. I need hardly say to an assemblage of lawyers that as the half century that has passed away since most of those decisions were rendered has completely established and confirmed and rendered plainer and plainer the soundness and the wisdom of the law they involve, so experience has likewise shown that in this solitary instance in which his opinion was rejected the Chief Justice was right. He correctly anticipated with a far-reaching sagacity what would be the result of a system of insolvency that discharges a debtor in one State and fails to discharge him

¹ 12 Wheaton's Reports, 213 (1827).

in another; that pays one creditor who is within the State and fails to pay another who is without it. And he clearly perceived that if that great power was to be reposed at all in the Federal Government as it is and of necessity must be, it ought to be an exclusive power. There is the only and mistaken instance in which his judgment on a constitutional question did not become the law of the land.”¹

Professor Thayer, on the other hand, approves the majority view in *Ogden v. Saunders*. He says: “In the great bankruptcy cases of *Sturges v. Crowninshield* and *Ogden v. Saunders*, where it was held, in 1819 and 1827, that the constitutional provisions as to the impairment of contracts forbade the State to enact an insolvency law which should discharge a person from liability on a contract made before the law; and then again that it did not forbid the same thing as touching a contract made after the law, Marshall, who gave the opinion in the first case, put it on a ground equally applicable to the second; and so in the second case gave a dissenting opinion. The obligation of the contract, he said, comes from the agreement of the party; it does not arise from the law of the State at the time it was made, entering into or operating on the contract. But this doctrine and this reasoning were justly disallowed.”²

The reasons and grounds in support of the proposition that the power of Congress to pass a bankruptcy act proper, *i. e.*, one providing for the discharge of a debtor from his contracts without performance thereof, is ex-

¹ Marshall Memorial, III, 888, 889.

² John Marshall: By James Bradley Thayer, 1901. (Houghton, Mifflin & Co., Riverside Biographical Series.)

clusive, is strongly put by Mr. Webster in his argument in the case of *Ogden v. Saunders*.¹

Marshall's dissenting opinion in *Ogden* against Saunders will be found in a subsequent part of the present volume.

In the subsequent case of *Boyle v. Zacharie*, 6 Peters, 348 (1832), in answer to an inquiry by Mr. Wirt, Marshall, Chief Justice, said:

"The judges who were in the minority of the court upon the general question as to the constitutionality of State insolvent laws concurred in the opinion of Mr. Justice Johnson in the case of *Ogden v. Saunders*, 12 Wheat. 213. That opinion is therefore to be deemed the opinion of the other judges who assented to that judgment. Whatever principles are established in that opinion are to be considered no longer open for controversy, but the settled law of the court."

See to the same effect the same case, reported in 6 Peters, at page 635, where the opinion is given by Mr. Justice Story.

Sturges v. Crowninshield.

February Term, 1819.

[4 Wheaton's Reports, 122-208.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of *Decisions of the Supreme Court of the United States*:

The act of the Legislature of the State of New York, passed on the 3d of April, 1811 (which not only liberates the person of the debtor, but discharges

¹ Works of Daniel Webster, Little & Brown's edition, 1851, Vol. VI, 24 *et seq.*

him from all liability of any debt contracted previous to his discharge on his surrendering his property in the manner it prescribes), so far as it attempts to discharge the contract, is a law impairing the obligation of contracts within the meaning of the Constitution of the United States, and is not a good plea in bar to an action brought upon such contract, in a court the proceedings of which the Legislature which passed the law had no right to control, and in a case where the creditor had not proceeded to execution against the body of his debtor within the State of New York.

Since the adoption of the Constitution of the United States, a State has authority to pass a bankrupt law, provided such law does not impair the obligation of contracts, within the meaning of the Constitution, article 1, section 10, and provided there be no act of Congress in force to establish a uniform system of bankruptcy, conflicting with such law.

Crowninshield, on the 22d of March, 1811, made two promissory notes to Sturges, due in the following August. On the 3d of April, 1811, the Legislature of New York, in which State the notes were given, passed "An act for the benefit of insolvent debtors and their creditors." Crowninshield did not pay his notes, but complied with the act referred to, and obtained a discharge. Sturges sued him before the United States Circuit Court for the district of Massachusetts, and the judges being opposed in opinion upon the great questions in the case, it was brought before the

Statement of case.

Supreme Court, the opinion of which was delivered on the 17th of February, 1819.¹

MARSHALL, Chief Justice. This case is adjourned from the court of the United States for the first circuit and the district of Massachusetts, on several points on which the judges of that court were divided, which are stated in the record for the opinion of this court. The first is,—

Opinion.

Whether, since the adoption of the Constitution of the United States, any State has authority to pass a bankrupt law, or whether the power is exclusively vested in the Congress of the United States?

This question depends on the following clause in the eighth section of the first article of the Constitution of the United States:

“The Congress shall have power,” etc., to “establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States.”

Clause of the Constitution of United States on which this case depends.

The counsel for the plaintiff contend that the grant of this power to Congress, without limitation, takes it entirely from the several States.

Contention of plaintiff.

¹The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

BROCKHOLST LIVINGSTON,

THOMAS TODD,

GABRIEL DUVALL,

JOSEPH STORY,

Associate Justices.

Justice Thomas Todd was absent on account of indisposition.

Mr. Daggett and Mr. Hopkinson appeared for the plaintiff.

Mr. Hunter and Mr. D. B. Ogden appeared for the defendant.

In support of this proposition, they argue that every power given to Congress is necessarily supreme; and if, from its nature, or from the words of grant, it is apparently intended to be exclusive, it is as much so as if the States were expressly forbidden to exercise it.

These propositions have been enforced and illustrated by many arguments drawn from different parts of the Constitution. That the power is both unlimited and supreme is not questioned. That it is exclusive is denied by the counsel for the defendant.

In considering this question it must be recollected that, previous to the formation of the new Constitution, we were divided into independent States, united for some purposes, but in most respects sovereign. These States could exercise almost every legislative power, and among others that of passing bankrupt laws. When the American people created a National Legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed not from the people of America, but from the people of the several States; and remain, after the adoption of the Constitution, what they were before, except so far as they may be abridged by that instrument. In some instances, as in making treaties, we find an express prohibition; and this shows the sense of the convention to have been that the mere grant of a power to Congress did not imply a prohibition on the States to exercise the same power. But it has never been supposed that this concurrent power of legislation extended to every possible case in which its exercise by the States has not been expressly prohibited. The con-

Defendant's contention.

Condition prior to the adoption of the Federal Constitution.

fusion resulting from such a practice would be endless. The principle laid down by the counsel for the plaintiff, in this respect, is undoubtedly correct. Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State Legislatures as if they had been expressly forbidden to act on it.¹

If terms are such that power is exclusively granted to Congress, subject is taken completely from States.

Is the power to establish uniform laws on the subject of bankruptcies throughout the United States of this description?

Is the subject of bankruptcy such an exclusive power?

The peculiar terms of the grant certainly deserve notice. Congress is not authorized merely to pass laws the operation of which shall be uniform, but to *establish* uniform laws on the subject throughout the United States. This *establishment* of *uniformity* is, perhaps, incompatible with State legislation on that part of the subject to which the acts of Congress may extend. But the subject is divisible in its nature into bankrupt and insolvent laws; though the line of partition between them is not so distinctly marked as to enable any person to say, with positive precision, what belongs exclusively to the one, and not to the other class of laws. It is said, for example, that laws which merely liberate the person are insolvent laws, and those which discharge the contract are bankrupt laws. But if an act of Congress should discharge the person of the bankrupt, and leave his future acquisitions liable to his creditors, we should feel

¹ Von Holst, Const. Law of U. S., 52, note. See also notes at end of *Barron v. Mayor and City of Baltimore* in this volume; Benton's "Thirty Years' View," II, 229-240; Webster's Works, V, 8, 10, 11; VI, 25, Mr. Webster's argument in the case of *Ogden v. Saunders*.

much hesitation in saying that this was an insolvent, not a bankrupt, act; and therefore unconstitutional. Another distinction has been stated, and has been uniformly observed. Insolvent laws operate at the instance of an imprisoned debtor, bankrupt laws at the instance of a creditor. But should an act of Congress authorize a commission of bankruptcy to issue on the application of a debtor, a court would scarcely be warranted in saying that the law was unconstitutional, and the commission a nullity.

**Examples distinguish-
ing insolvent and
bankrupt laws.**

When laws of each description may be passed by the same Legislature, it is unnecessary to draw a precise line between them. The difficulty can arise only in our complex system, where the Legislature of the Union possesses the power of enacting bankrupt laws; and those of the States, the power of enacting insolvent laws. If it be determined that they are not laws of the same character, but are as distinct as bankrupt laws, and laws which regulate the course of descents, a distinct line of separation must be drawn, and the power of each government marked with precision. But all perceive that this line must be in a great degree arbitrary. Although the two systems have existed apart from each other, there is such a connection between them as to render it difficult to say how far they may be blended together. The bankrupt law is said to grow out of the exigencies of commerce, and to be applicable solely to traders; but it is not easy to say who must be excluded from, or may be included within, this description. It is, like every other part of the subject, one on which the Legislature may exercise an extensive discretion.

This difficulty of discriminating with any accuracy between insolvent and bankrupt laws would lead to the opinion that a bankrupt law may contain those regulations which are generally found in insolvent laws; and that an insolvent law may contain those which are common to a bankrupt law. If this be correct, it is obvious that much inconvenience would result from that construction of the Constitution which should deny to the State Legislatures the power of acting on this subject, in consequence of the grant to Congress. It may be thought more convenient that much of it should be regulated by State legislation, and Congress may purposely omit to provide for many cases to which their power extends. It does not appear to be a violent construction of the Constitution, and is certainly a convenient one, to consider the power of the States as existing over such cases as the laws of the Union may not reach. But be this as it may, the power granted to Congress may be exercised or declined, as the wisdom of that body shall decide. If, in the opinion of Congress, uniform laws concerning bankruptcies ought not to be established, it does not follow that partial laws may not exist, or that State legislation on the subject must cease. It is not the mere existence of the power, but its exercise, which is incompatible with the exercise of the same power by the States. It is not the right to establish these uniform laws, but their actual establishment, which is inconsistent with the partial acts of the States.

Difficulty of discriminating between insolvent and bankrupt laws.

It has been said that Congress has exercised this power; and by doing so has extinguished the power of the States, which cannot be revived by repealing the law of Congress.

We do not think so. If the right of the States to pass a bankrupt law is not taken away by the mere grant of that power to Congress, it cannot be extinguished; it can only be suspended by the enactment of a general bankrupt law. The repeal of that law cannot, it is true, confer the power on the States; but it removes a disability to its exercise which was created by the act of Congress.

Without entering farther into the delicate inquiry respecting the precise limitations which the several grants of power to Congress contained in the Constitution may impose on the State Legislatures than is necessary for the decision of the question before the court, it is sufficient to say that, until the power to pass uniform laws on the subject of bankruptcies be exercised by Congress, the States are not forbidden to pass a bankrupt law, provided it contain no principle which violates the tenth section of the first article of the Constitution of the United States.¹

This opinion renders it totally unnecessary to consider the question whether the law of New York is, or is not, a bankrupt law.

We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts within the meaning of the Constitution of the United States?

This act liberates the person of the debtor, and dis-

¹ In *Golden v. Prince*, 8 Wash. 818, Judge Washington had previously held in the Circuit Court of the United States for Pennsylvania, that Congress had the exclusive power to pass bankrupt laws; but this opinion was subsequently corrected, and qualified. Kent, Com. (12th ed.), I, 388, note; *Id.*, I, 420. Judge Washington always adhered to this view. Kent, Com., I, 458, note a; II, 390, note c; Story, Com., I, ch. V, § 443, note.

charges him from all liability for any debt previously contracted, on his surrendering his property in the manner it prescribes.

In discussing the question whether a State is prohibited from passing such a law as this, What is the obligation of a contract and what will impair it? our first inquiry is into the meaning of words in common use. What is the obligation of a contract? and what will impair it?

It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be explained. A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. In the case at bar the defendant has given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract binds him to pay that sum on that day; and this is its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid, and entirely discharges it.

The words of the Constitution, then, are express, and incapable of being misunderstood. They admit of no variety of construction, and are acknowledged to apply to that species of contract, an engagement between man and man for the payment of money, which has been entered into by these parties. Yet the opinion that this law is not within the prohibition of the Constitution has been entertained by those who are entitled to great respect, and has been supported by arguments which deserve to be seriously considered.

It has been contended that as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it.

Plaintiff contends that contract can only bind a man to pay to full extent of his property.

But it is not true that the parties have in view only the property in possession when the contract is formed, or that its obligation does not extend to future acquisitions. Industry, talents, and integrity constitute a fund which is as confidently trusted as property itself. Future acquisitions are therefore liable for contracts; and to release them from this liability impairs their obligation.¹

Future acquisitions are liable for contracts.

It has been argued that the States are not prohibited from passing bankrupt laws, and that the essential principle of such laws is to discharge the bankrupt from all past obligations; that the States have been in the constant practice of passing insolvent laws, such as that of New York; and if the framers of the Constitution had intended to deprive them of this power, insolvent laws would have been mentioned in the prohibition; that the prevailing evil of the times, which produced this clause in the Constitution, was the practice of emitting paper money, of making property which was useless to the creditor a discharge of his debt, and of changing the time of payment by authorizing distant instalments. Laws of this description, not insolvent laws, constituted, it is said, the mischief to be remedied; and laws of this description, not insolvent laws, are within the true spirit of the prohibition.

¹ Tucker, Const. of U. S., II, 561. See also *Ogden v. Saunders*, 12 Wheaton, 218, and for a review of the decisions in *Sturges v. Crowninshield* and *Ogden v. Saunders*, see case of *Boyle v. Zacharie*, 6 Pet. 348.

The Constitution does not grant to the States the power of passing bankrupt laws, or any other power; but finds them in possession of it, and may either prohibit its future exercise entirely, or restrain it so far as national policy may require. It has so far restrained it as to prohibit the passage of any law impairing the obligation of contracts. Although, then, the States may, until that power shall be exercised by Congress, pass laws concerning bankrupts, yet they cannot constitutionally introduce into such laws a clause which discharges the obligations the bankrupt has entered into. It is not admitted that, without this principle, an act cannot be a bankrupt law; and if it were, that admission would not change the Constitution, nor exempt such acts from its prohibitions.

What the States may do and the limitations set upon them.

The argument drawn from the omission in the Constitution to prohibit the States from passing insolvent laws admits of several satisfactory answers. It was not necessary, nor would it have been safe, had it even been the intention of the framers of the Constitution to prohibit the passage of all insolvent laws, to enumerate particular subjects to which the principle they intended to establish should apply. The principle was the inviolability of contracts. This principle was to be protected in whatsoever form it might be assailed. To what purpose enumerate the particular modes of violation Idem. which should be forbidden, when it was intended to forbid all? Had an enumeration of all the laws which might violate contracts been attempted, the provision must have been less complete and involved in more perplexity than it now is. The plain and simple declaration, that no State shall pass any law impairing the obligation of contracts, includes insolvent laws, and all other laws, so far

as they infringe the principle the convention intended to hold sacred, and no farther.

But a still more satisfactory answer to this argument is that the convention did not intend to prohibit the passage of all insolvent laws. To punish honest insolvency by imprisonment for life, and to make this a constitutional principle, would be an excess of inhumanity which will not readily be imputed to the illustrious patriots who framed our Constitution, nor to the people who adopted it. The distinction between the obligation of a contract and the remedy given by the Legislature to enforce that obligation has been taken at the bar, and exists in the nature of things.¹ Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the Nation shall direct. Confinement of the debtor may be a punishment for not performing his contract, or may be allowed as a means of inducing him to perform it. But the State may refuse to inflict this punishment, or may withhold this means, and leave the contract in full force. Imprisonment is no part of the contract, and simply to release the prisoner does not impair its obligation. No argument can be fairly drawn from the sixty-first section of the act for establishing a uniform system of bankruptcy, which militates against this reasoning. That section declares

Distinction between the obligation of a contract and the remedy given to enforce it.

¹ Kent does not agree with Marshall on this point. Kent, Com. (12th ed.), I, 456, note a. See also s. P., Justice Washington's objection to this dictum in *Mason v. Haile*, 12 Wheaton, 878. The distinction here adverted to by Marshall is, however, firmly established in the jurisprudence of this country. The Legislature as to pre-existing contracts may modify or alter the remedy, provided such change does not substantially impair the ability of the creditor to enforce performance of the contract. *Seibert v. Lewis*, 122 U. S. 284.

that the act shall not be construed to repeal or annul the laws of any State *then in force* for the relief of insolvent debtors, except so far as may respect persons and cases clearly within its purview; and in such cases it affords its sanction to the relief given by the insolvent laws of the State, if the creditor of the prisoner shall not, within three months, proceed against him as a bankrupt.

The insertion of this section indicates an opinion in Congress that insolvent laws might be considered as a branch of the bankrupt system, to be repealed or annulled by an act for establishing that system, although not within its purview. It was for that reason only that a provision against this construction could be necessary. The last member of the section adopts the provisions of the State laws, so far as they apply to cases within the purview of the act.

Insolvent laws a branch of the bankrupt system.

This section certainly attempts no construction of the Constitution, nor does it suppose any provision in the insolvent laws impairing the obligation of contracts. It leaves them to operate, so far as constitutionally they may, unaffected by the act of Congress, except where that act may apply to individual cases.

The argument which has been pressed most earnestly at the bar is, that, although all legislative acts, which discharge the obligation of a contract without performance, are within the very words of the Constitution, yet an insolvent act, containing this principle, is not within its spirit, because such acts have been passed by Colonial and State Legislatures from the first settlement of the country, and be-

Points raised at the bar by plaintiff.

cause we know, from the history of the times, that the mind of the convention was directed to other laws, which were fraudulent in their character, which enabled the debtor to escape from his obligation and yet hold his property, not to this, which is beneficial in its operation.

Before discussing this argument, it may not be improper to premise, that, although the spirit of an instrument, especially of a Constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme to infer from extrinsic circumstances that a case, for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words is justifiable. But if in any case the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case would be so monstrous that all mankind would, without hesitation, unite in rejecting the application.

This is certainly not such a case. It is said the Colonial and State Legislatures have been in the habit of passing laws of this description for more than a century; that they have never been the subject of complaint, and consequently could not be within the view of the general convention.

The fact is too broadly stated. The insolvent laws of many, indeed of by far the greater number, of the States do not contain this principle. They discharge the person of the debtor, but leave his obligation to pay in full force. To this the Constitution is not opposed.

Insolvent laws of many States discharge the person of debtor but leave in force his obligation to pay.

But were it even true that this principle had been introduced generally into those laws, it would not justify our varying the construction of the section. Every State in the Union, both while a colony and after becoming independent, had been in the practice of issuing paper money; yet this practice is in terms prohibited.¹ If the long exercise of the power to emit bills of credit did not restrain the convention from prohibiting its future exercise, neither can it be said that the long exercise of the power to impair the obligation of contracts should prevent a similar prohibition. It is not admitted that the prohibition is more express in the one case than in the other. It does not, indeed, extend to insolvent laws by name, because it is not a law by name, but a principle, which is to be forbidden; and this principle is described in as appropriate terms as our language affords.

Neither, as we conceive, will any admissible rule of construction justify us in limiting the prohibition under consideration to the particular laws which have been described at the bar, and which furnished such cause for general alarm. What were those laws?²

We are told they were such as grew out of the general

¹ See also Thorpe, Const. Hist. of U. S., I, 125-128 and notes. "The power to make anything but gold and silver a tender in payment of debts is withdrawn from the States, on the same principle with that of issuing a paper currency." Madison, Federalist, No. 44. (See note on *Trevett v. Weedon*, at end of this case.)

² See McMaster, Hist. People of U. S., V, 161, 162.

distress following the war in which our independence was established. To relieve this distress, paper money was issued; worthless lands, and other property of no use to the creditor, were made a tender in payment of debts; and the time of payment stipulated in the contract was extended by law.¹ These were the peculiar evils of the day. So much mischief was done, and so much more was apprehended, that general distrust prevailed, and all confidence between man and man was destroyed.² To laws of this description, therefore, it is said, the prohibition to pass laws impairing the obligation of contracts ought to be confined.

Let this argument be tried by the words of the section under consideration.

Was this general prohibition intended to prevent paper money? We are not allowed to say so, because it is expressly provided that, no State shall "emit bills of credit."³ Neither could these words be intended to restrain the States from enabling debtors to discharge their debts by the tender of property of no real value to the creditor, because for that subject also particular provision is made.

No State shall emit bills of credit.

¹ McMaster, Hist. People of U. S., III, 416, 417.

² "The decision of Judge Clark in 1823, [in the famous Kentucky old and new court controversy] that the replevin and stay laws were unconstitutional, had been followed by an attempt to remove him by an address of the Legislature to the Governor. The effort failed, but when, in 1823, the Court of Appeals likewise declared the whole system of relief laws unconstitutional, the Assembly voted that the decision of the court was erroneous, cut down the salary of each of the three judges to twenty-five cents a year, and made the question of removing them a political issue." McMaster, Hist. People of U. S., V, 162; Oration of Jeremiah Smith, Marshall Memorial, I, 144, 145.

³ Craig v. State of Missouri, 4 Pet. 411; *post*, pp. 620-643.

Nothing but gold and silver coin can be made a tender in payment of debts.

It remains to inquire whether the prohibition under consideration could be intended for the single case of a law directing that judgments should be carried into execution by instalments?

This question will scarcely admit of discussion. If this was the only remaining mischief against which the Constitution intended to provide, it would undoubtedly have been, like paper money and tender laws, expressly forbidden. At any rate, terms more directly applicable to the subject, more appropriately expressing the intention of the Convention, would have been used. It seems scarcely possible to suppose that the framers of the Constitution, if intending to prohibit only laws authorizing the payment of debts by instalment, would have expressed that intention by saying, "No State shall pass any law impairing the obligation of contracts." No men would so express such an intention. No men would use terms embracing a whole class of laws, for the purpose of designating a single individual of that class. No court can be justified in restricting such comprehensive words to a particular mischief to which no allusion is made.

No State shall pass any law impairing the obligation of contracts.

The fair and, we think, the necessary, construction of the sentence requires that we should give these words their full and obvious meaning.

Construction.

A general dissatisfaction with that lax system of legislation which followed the war of our revolution undoubtedly directed the mind of the convention to this subject. It is probable that laws, such as those which have been stated in argument, produced the loudest complaints, were most immediately felt. The attention

of the convention, therefore, was particularly directed to paper money, and to acts which enabled the debtor to discharge his debt otherwise than was stipulated in the contract. Had nothing more been intended, nothing more would have been expressed. But, in the opinion of the convention, much more remained to be done. The same mischief might be effected by other means. To restore public confidence completely, it was necessary not only to prohibit the use of particular means by which it might be effected, but to prohibit the use of any means by which the same mischief might be produced. The convention appears to have intended to establish a great principle, that contracts should be inviolable. The Constitution therefore declares that no State shall pass "any law impairing the obligation of contracts."

Construction of the contract-clause.

If, as we think, it must be admitted that this intention might actuate the convention; that it is not only consistent with, but is apparently manifested by, all that part of the section which respects this subject; that the words used are well adapted to the expression of it; that violence would be done to their plain meaning by understanding them in a more limited sense; those rules of construction, which have been consecrated by the wisdom of ages, compel us to say that these words prohibit the passage of any law discharging a contract without performance.

By way of analogy, the statutes of limitations and against usury have been referred to in argument; and it has been supposed that the construction of the Constitution which this opinion maintains would apply to them also, and must therefore be too extensive to be correct.

We do not think so. Statutes of limitations relate to the remedies which are furnished in the courts. They rather establish that certain circumstances shall amount to evidence that a contract has been performed, than dispense with its performance. If, in a State where six years may be pleaded in bar to an action of *assumpsit*, a law should pass declaring that contracts already in existence, not barred by the statute, should be construed to be within it, there could be little doubt of its unconstitutionality.

Statutes of limitations relate to remedies and are not in point.

So with respect to the laws against usury. If the law be, that no person shall take more than six per centum per annum for the use of money, and that, if more be reserved, the contract shall be void, a contract made thereafter, reserving seven per cent., would have no obligation in its commencement; but if a law should declare that contracts already entered into, and reserving the legal interest, should be usurious and void, either in the whole or in part, it would impair the obligation of the contract, and would be clearly unconstitutional.

Laws against usury not in point.

This opinion is confined to the case actually under consideration. It is confined to a case in which a creditor sues in a court, the proceedings of which the Legislature, whose act is pleaded, had not a right to control; and to a case where the creditor had not proceeded to execution against the body of his debtor, within the State whose law attempts to absolve a confined insolvent debtor from his obligation. When such a case arises, it will be considered.

It is the opinion of the court that the act of the State of New York which is pleaded by the defendant in this

cause, so far as it attempts to discharge this defendant from the debt in the declaration mentioned, is contrary to the Constitution of the United States, and that the plea is no bar to the action.

Act of State so far as discharges defendant from the debt is unconstitutional.

NOTE.

Kent, commenting on the foregoing case, says: "It remains yet to be settled whether it be lawful for a State to pass an insolvent law, which shall be effectual to discharge the debtor from a debt contracted after the passing of the act and contracted within the State making the law. The general language of the court would seem to reach even this case; but the facts in these cases decided do not cover this ground, and the cases decided are not authority to that extent."¹

The Supreme Court of the United States went a step further in the case of *M'Millan v. M'Neill*, 4 Wheaton, 209. This was a discharge under the insolvent law of a different government from that in which the contract was made. The facts in this case are as follows:

M'Neill was surety on custom-house bonds given in 1811 by M'Millan, as importer of foreign merchandise. M'Neill paid the bonds on August 23 and September 23, 1813, after suit and judgment. M'Millan, then a resident of Charleston, South Carolina, afterwards removed to New Orleans, and on August 23, 1815, was discharged from all his indebtedness under a bankrupt or insolvent law of the State of Louisiana, passed in 1808. M'Millan also obtained a certificate of discharge under the laws of England. M'Neill does not seem to have appeared in either of the proceedings for M'Millan's discharge, and on July 1, 1817, brought suit against M'Millan to recover the amount paid under the judgments on the custom-house bonds.

This cause was argued by Mr. C. J. Ingersoll for M'Millan, the plaintiff in error, no counsel appearing for the defendant in error.

Mr. Chief Justice MARSHALL delivered the opinion of the court, stating that this case was not distinguishable in

¹ Kent, Com. (12th ed.), I, 421, 422.

principle from the preceding case of *Sturges v. Crowninshield*. That the circumstances of the State law, under which the debt was attempted to be discharged, having been passed before the debt was contracted, made no difference in the application of the principle, and that as to the certificate under the English bankrupt law, it has frequently been determined, and was well settled, that a discharge under a foreign law was no bar to an action on a contract made in this country.

In *Farmers & Mechanics' Bank of Pennsylvania v. Smith*, 6 Wheaton, 131, it was held that

AN ACT of a State Legislature which discharges a debtor from all liability for debts contracted previous to his discharge, on his surrendering his property for the benefit of his creditors, is a law impairing the obligation of a contract previously made, within the meaning of the Constitution of the United States, so far as it attempts to discharge the contract; and it makes no difference, in such a case, that the suit was brought in the State court of the State, of which both the parties were citizens, where the contract was made and the discharge obtained, and where they continued to reside until the suit was brought.

Error to the Supreme Court of the State of Pennsylvania.

This was an action of *assumpsit*, brought by the plaintiffs in error, in the Supreme Court of the Commonwealth of Pennsylvania. The defendant pleaded a discharge under an insolvent law of the State of Pennsylvania, passed after the contract declared on was made. *The plea also averred that the cause of action [*133] arose in the city and county of Philadelphia, from contracts made within the same, and that the plaintiffs and defendants were, at the time the said contracts were made, and at the time the causes of action accrued and at the time the said act passed, citizens of the State of Pennsylvania and still continued to be citizens thereof. To this plea there was a demurrer; and judgment being rendered thereon for the defendant the cause was brought by writ of error to this court.

Hopkins, for the plaintiffs.
Sergeant, for the defendant.

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MARSHALL, Chief Justice, delivered the opinion of the court, that this case was not distinguishable from its former decisions on the same subject,¹ except by the circumstances that the defendant, in the present case, was a citizen of the same State with the plaintiffs at the time the contract was made in that State and remained such at the time the suit was commenced in its courts. But that these facts made no difference in the cases. The Constitution of the United States was made for the whole people of the Union and is equally binding upon all the courts and all the citizens. *Judgment reversed.*

"It may also be noted that the bankruptcy laws have greatly modified the existing system of enforcing contracts or collecting debts, in the case of persons who fail to meet their engagements, or to pay for want of ability to do so. Those laws are administered under Federal statutes, and not only under an act of Congress, but under the rules of practice prescribed and adopted for the courts of the United States.

"As to what is a bankruptcy, see opinion of Judge Catron delivered in the Circuit Court, *In re Klein*, 1 How. 277. The whole subject was elaborately considered by the Supreme Court of New York in *Kunzler v. Kohaus*, 5 Hill, 317." Miller on the Constitution of the United States, 109, 110 and note 1.

In the case of *Kunzler v. Kohaus* the court decided, *inter alia*, that the voluntary feature of the bankrupt law of 1841, involving a principle hitherto unknown in the bankrupt laws of other countries or of the United States, was unconstitutional because not the bankrupt laws within the contemplation of the Constitution. But this case was overruled by decisions in the Supreme Court of the United States.

In *Trevett v. Weedon* in 1786, in Rhode Island, the judges decided that a law making paper money a tender in payment of debts was unconstitutional and against the principles of *Magna Charta*. They were compelled to appear before the Legislature to vindicate themselves; and the next year (being chosen annually) they were left out of office for questioning the legislative power. Story, Com. on Const. of U. S., I, 469, note; Marshall Memorial, II, 248, 249, 508; Thorpe, Const. Hist. of U. S., I, 268-270.

¹ *Sturges v. Crowninshield*, 4 Wheaton, 122-208.

REFERENCES TO STURGES v. CROWNINSHIELD, IN MARSHALL MEMORIAL

VOL. I

Justice Horace Gray, pp. 70, 98; Prof. James Bradley Thayer, p. 284; Judge Le Baron Colt, p. 304; Judge James T. Mitchell, p. 484; Hon. John Bassett Moore, p. 518.

VOL. II.

Hon. H. Warner Hill, p. 112; Hampton L. Carson, Esq., p. 261; Hon. William A. Ketcham, p. 294; Hon. Henry Cabot Lodge, p. 329; Hon. Henry Hitchcock, p. 515.

VOL. III.

Hon. Bartlett Tripp, p. 157; Judge J. A. Cooper, p. 190; Judge Cornelius H. Hanford, p. 250; Hon. Edward J. Phelps, pp. 888, 889.

NATIONAL AND STATE SOVEREIGNTY—CONGRESS HAS THE CONSTITUTIONAL POWER TO CHARTER A BANK AS A FISCAL AGENCY OF THE GENERAL GOVERNMENT—THE STATES HAVE NO POWER TO TAX ITS OPERATIONS OR FRANCHISES WITHOUT THE CONSENT OF CONGRESS.

At the February term, 1819, the Supreme Court decided three causes confessedly among the greatest and most important in its history,— the bankruptcy case of *Sturges v. Crowninshield*, above given, The Maryland Bank case, and the Dartmouth College case, both of which immediately follow.

In the Maryland Bank case the validity of the act of Congress of 1816 incorporating the United States Bank, and the validity of an act of the Maryland Legislature of 1818 imposing a stamp tax on notes issued by the branch Bank of the United States in Maryland, were involved. Counsel the most eminent in the country were concerned in the case; the arguments occupied more than a week. Webster opened, Hopkinson followed, then Wirt, Jones and Martin in the order named. Mr. Pinkney made the closing reply, which occupied three days in delivery.

The word "Bank" or "Incorporation" is not found in the Federal Constitution, but the power of Congress to incorporate the bank was deduced by the court from the express powers to lay and collect taxes, etc., and from the clause conferring on Congress authority to make all laws necessary and proper to carry into effect the powers expressly granted. It was accordingly held by the Su-

preme Court that Congress had power to charter a bank as an agency of the General Government; and it was also held that the act of the State taxing the operations of the bank without the consent of Congress was in conflict with the Constitution and laws of the United States and was, therefore, void. But the court admitted that the States might tax the "property" of the bank as distinguished from its "operations" and "franchises."

The principles of this decision in both of its parts are among the settled and no longer questioned doctrines of American constitutional law. The reports of the Supreme Court since 1819 show that scores of cases have arisen in regard to the power of the States to tax or otherwise burden or retard the agencies, instrumentalities, powers or operations of the General Government, and these cases have all been professedly decided on the doctrines laid down in the Maryland Bank case.

The latest decision on the subject is in the case of the Atlantic and Pacific Telegraph Company *v.* The City of Philadelphia, October term, 1902 (190 U. S. 160). Mr. Justice Brewer's summary of the decisions of the court will be found in the foot-note.¹

¹Few questions are more important or have been more embarrassing than those arising from the efforts of a State or its municipalities to increase their revenues by exactions from corporations engaged in carrying on interstate commerce. There have been many cases in whose decision some propositions have been adjudicated so often as to be no longer open to discussion.

First. As said by Mr. Justice Bradley, speaking for the court, in *Robbins v. Shelby Taxing District*, 120 U. S. 489, 492:

"The Constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system, or plan of regulation."

In the present case occurs Marshall's famous *dictum*: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create."

It was in this case also that Mr. Pinkney in the ornate

In addition to the many cases referred to by him the following subsequent decisions may also be cited: *Fargo v. Michigan*, 121 U. S. 230, 246; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, 336, 346; *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347, 357; *Bowman v. Chicago, etc. Ry. Co.*, 125 U. S. 465, 497; *Leloup v. Port of Mobile*, 127 U. S. 640, 648; *Asher v. Texas*, 128 U. S. 129, 131; *Stoutenburgh v. Hennick*, 129 U. S. 141, 148; *Leisy v. Hardin*, 135 U. S. 100, 110; *Lyng v. Michigan*, 135 U. S. 161; *McCall v. California*, 136 U. S. 104, 109; *In re Rahrer*, 140 U. S. 545, 555; *Crutcher v. Kentucky*, 141 U. S. 47, 58; *Brennan v. Titusville*, 153 U. S. 289, 304; *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 471; *United States v. Knight Co.*, 156 U. S. 1, 21; *Schollenberger v. Pennsylvania*, 171 U. S. 1; *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211; *Stockard v. Morgan*, 185 U. S. 27.

Second. No State can compel a party, individual or corporation to pay for the privilege of engaging in interstate commerce. *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 211; *Pickard v. Pullman Car Co.*, 117 U. S. 34; *Robbins v. Shelby Taxing District*, 120 U. S. 489; *Fargo v. Michigan*, 121 U. S. 230, 245; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326, 336; *Leloup v. Port of Mobile*, 127 U. S. 640, 645; *Asher v. Texas*, 128 U. S. 129; *Lyng v. Michigan*, 135 U. S. 161, 166; *McCall v. California*, 136 U. S. 104, 115; *Crutcher v. Kentucky*, 141 U. S. 47, 58; *Adams Express Co. v. Ohio*, 165 U. S. 194, 220.

Third. This immunity does not prevent a State from imposing ordinary property taxes upon property having a situs within its territory and employed in interstate commerce. *State Tax on Railway Gross Receipts*, 15 Wall. 284, 298; *The Delaware Railroad Tax*, 18 Wall. 206, 232; *Telegraph Co. v. Texas*, 105 U. S. 460, 464; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 211; *Western Union Tel. Co. v. Massachusetts*, 125 U. S. 530; *Marye v. Baltimore & Ohio Railroad*, 127 U. S. 117, 123; *Leloup v. Port of Mobile*, 127 U. S. 640, 649; *Pullman Car Co. v. Pennsylvania*, 141 U. S. 18; *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40; *Pittsburg, etc. Ry. Co. v.*

style of the period referred to the Supreme Court as "more than Amphictyonic council," declaring that he saw in the power of the court under the Constitution to decide the conflicting sovereign claims of the Nation and the States, "a pledge of the immortality of the Union, of a perpetuity of national strength and glory, increasing and brightening with age, — of concord at home and reputation abroad."¹

Backus, 154 U. S. 421; Western Union Tel. Co. v. Taggart, 163 U. S. 1; Adams Express Co. v. Ohio, 165 U. S. 194, 220.

Fourth. The franchise of a corporation, although that franchise is the business of interstate commerce, is, as a part of its property, subject to State taxation, providing at least the franchise is not derived from the United States. Delaware Railroad Tax, 18 Wall. 206, 232; Postal Tel. Cable Co. v. Adams, 155 U. S. 688, 696; Erie Railroad v. Pennsylvania, 158 U. S. 431, 437; Central Pacific Railroad v. California, 162 U. S. 91; Western Union Tel. Co. v. Taggart, 163 U. S. 1, 18; Western Union Tel. Co. v. Missouri ex rel. Gottlieb, *post*, 163.

Fifth. No corporation, even though engaged in interstate commerce, can appropriate to its own use property, public or private, without liability to charge therefor. Packet Co. v. St. Louis, 100 U. S. 428; Packet Co. v. Catlettsburg, 105 U. S. 559; Transportation Co. v. Parkersburg, 107 U. S. 691; Huse v. Glover, 119 U. S. 543; Ouachita Packet Co. v. Aiken, 121 U. S. 444; St. Louis v. Western Union Tel. Co., 148 U. S. 92; St. Louis v. Western Union Tel. Co., 149 U. S. 465; Postal Tel. Cable Co. v. Baltimore, 156 U. S. 210; Richmond v. Southern Bell Tel. Co., 174 U. S. 761, 771.

¹ Wheaton, Life, etc. of William Pinkney, p. 163.

It was of this argument that Justice Story contemporaneously wrote March 3, 1819, to his brother-in-law, Mr. White — "For more than a week past we have been engaged in the cause of Maryland v. The Bank of the United States. Mr. Pinkney rose on Monday to conclude the argument; he spoke all that day and yesterday, and will probably conclude to-day. I never in my whole life heard a greater speech; it was worth a journey from Salem to hear it; his elocution was excessively vehement, but his eloquence was overwhelming. His language, his style, his figures, his arguments, were

The opinion of the Chief Justice in the Bank Case is one of his most lofty and massive productions. Professor Thayer, indeed, regards it as probably Marshall's "greatest opinion."¹ Chancellor Kent's high estimate may be seen in the note below.

The numerous references on Marshall day to the opin-

most brilliant and sparkling. He spoke like a great statesman and patriot, and a sound constitutional lawyer. All the cobwebs of sophistry and metaphysics about State rights and State sovereignty he brushed away with a mighty besom. I fear that this speech will never be before the public; but if it should be it will attract universal admiration. Mr. Pinkney possesses, beyond any man I ever saw, the power of elegant and illustrative amplification." Story's Life and Letters, by his son, William W. Story, I, 324.

Story's letters abound with interesting details concerning Pinkney. Id., I, pp. 214-217, 251, 256, 278, 280, 415, 566; II, Lecture on Pinkney, pp. 490-495. Chief Justice Marshall says he "never knew Pinkney's equal as a reasoner." Id., p. 494. Story adds, "But Judge Marshall then forgot himself."

Mr. Hampton L. Carson collated from contemporary and authentic sources "Pen Sketches of William Pinkney as he appeared to his contemporaries," which he communicated to *The Legal Intelligencer*, February 8, 1895,—a most interesting production.

Justice Story's apprehension that Pinkney's speech would not be preserved was in part realized. But Mr. Wheaton, the reporter, took notes at the time; Mr. Pinkney afterwards supplied him with his own, and the substance of his argument so far as it exists appears in Wheaton's Life of Pinkney, pp. 161-166, 550-573 (Appendix VI). Fortunately this is sufficiently complete to exhibit somewhat adequately Mr. Pinkney's style and powers.

Mr. Webster's argument in the case does not appear in his collected works published by Little and Brown, 1851. "Of the speeches of Mr. Webster, who opened the cause, and of Mr. Wirt, who followed Mr. Hopkinson, we have but mere sketches, intended only to present the points to which their arguments were directed, with such brief illustration as is usually to be found in a report for the use of the profession." Kennedy's Wirt, II, 82.

¹ Marshall Memorial, I, 284.

ion of the Chief Justice, below given in full, show the consensus of professional judgment concerning its soundness and the greatness of its display of intellectual and logical force and close, severe and luminous reasoning.

M'Culloch v. The State of Maryland and Others.

February Term, 1819.

[4 Wheaton's Reports, 316-487.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of *Decisions of the Supreme Court of the United States*:

The act incorporating the Bank of the United States is a law made in pursuance of the Constitution.

A State law imposing a tax on the operations of the Bank of the United States is unconstitutional.

The power to establish a branch of the Bank of the United States in the State of Maryland might properly be exercised by the bank itself.

In April, 1816, the Congress of the United States incorporated the Bank of the United States. In 1817 a branch of this bank was located at Baltimore, Maryland. In 1818 the Legislature of Maryland passed a law to tax "all banks or branches thereof, in the State of Maryland, not chartered by the Legislature."¹ The branch of the United States Bank did not pay this tax, and M'Culloch, the cashier, was sued by John James, for himself and the

¹ This tax, it is important to bear in mind, was not upon the property of the bank, but took the form of requiring the notes of the bank to be upon stamped paper furnished by the State, the amount of the stamp being measured by the denomination of the bank notes. The proceeds of the stamp tax went into the treasury of the State.

State of Maryland, according to the provisions of the act imposing the tax. Judgment being given in the State courts against M'Culloch, he brought it before the Supreme Court,¹ the opinion of which was delivered on the 7th of March, 1819.

MARSHALL, Chief Justice. In the case now to be determined, the defendant, a sovereign State, denies
Opinion. the obligation of a law enacted by the Legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the Legislature of that State. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be

¹ The court was constituted as follows:

JOHN MARSHALL, <i>Chief Justice.</i>	
BUSHROD WASHINGTON,	} <i>Associate Justices.</i>
WILLIAM JOHNSON,	
BROCKHOLST LIVINGSTON,	
THOMAS TODD,	
GABRIEL DUVAL,	
JOSEPH STORY,	

Mr. Justice Todd was absent on account of indisposition.

Mr. Daniel Webster, Mr. William Pinkney and Attorney-General William Wirt appeared for plaintiff in error.

Mr. Joseph Hopkinson, Mr. Walter Jones and Mr. Luther Martin, Attorney-General of Maryland, appeared for defendants in error.

so decided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is, Has Congress power to incorporate a bank?

It has been truly said that this can scarcely be considered as an open question, entirely unprejudiced by the former proceedings of the Nation respecting it. The principle now contested was introduced at a very early period of our history, has been recognized by many successive Legislatures, and has been acted upon by the judicial department, in cases of peculiar delicacy, as a law of undoubted obligation.

Has Congress power to incorporate a bank?

It will not be denied that a bold and daring usurpation might be resisted, after an acquiescence still longer and more complete than this. But it is conceived that a doubtful question,—one on which human reason may pause and the human judgment be suspended, in the decision of which the great principles of liberty are not concerned, but the respective powers of those who are equally the representatives of the people are to be adjusted,—if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the Constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

The power now contested was exercised by the first Congress elected under the present Constitution. The bill for incorporating the Bank of the United States did not steal upon an unsuspecting Legislature, and pass un-

History of the bill for incorporating the Bank of the United States.

observed. Its principle was completely understood, and was opposed with equal zeal and ability. After being resisted, first in the fair and open field of debate, and afterwards in the executive cabinet, with as much persevering talent as any measure has ever experienced, and being supported by arguments which convinced minds as pure and as intelligent as this country can boast, it became a law. The original act was permitted to expire; but a short experience of the embarrassments, to which the refusal to revive it exposed the government, convinced those who were most prejudiced against the measure of its necessity, and induced the passage of the present law. It would require no ordinary share of intrepidity to assert that a measure adopted under these circumstances was a bold and plain usurpation, to which the Constitution gave no countenance.

These observations belong to the cause; but they are not made under the impression that, were the question entirely new, the law would be found irreconcilable with the Constitution.

In discussing this question, the counsel for the State of Maryland have deemed it of some importance, in the construction of the Constitution, to consider that instrument not as emanating from the people, but as the act of sovereign and independent States. The powers of the General Government, it has been said, are delegated by the States, who alone are truly sovereign; and must be exercised in subordination to the States, who alone possess supreme dominion.

It would be difficult to sustain this proposition. The convention which framed the Constitution was indeed elected by the State

Counsel for Maryland claim Constitution did not emanate from the people but as the act of sovereign and independent States.

Difficult to sustain this proposition.

Legislatures. But the instrument, when it came from their hands, was a mere proposal, without obligation or pretensions to it. It was reported to the then existing Congress of the United States, with a request that it might "be submitted to a convention of delegates, chosen in each State by the people thereof, under the recommendation of its Legislature, for their assent and ratification."

This mode of proceeding was adopted; and by the convention, by Congress, and by the State Legislatures, the in-

The people acted upon the Constitution by assembling in convention.

strument was submitted to the people. They acted upon it in the only manner in which they can act safely, effectively and wisely on such a subject, by assembling in convention. It is true they assembled in their several States — and where else should they have assembled? No political dreamer was ever wild enough to think of breaking down the lines which separate the States, and of compounding the American people into one common mass. Of consequence, when they act, they act in their States. But the measures they adopt do not, on that account, cease to be the measures of the people themselves, or become the measures of the State governments.

From these conventions the Constitution derives its whole authority. The government proceeds directly from the people; is "ordained and established" in the name of the people; and is declared to be ordained "in order to form a more perfect Union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity." The assent of the States in their sovereign capacity is implied in calling a convention, and thus submitting that instrument to the people. But the people were at perfect liberty to accept or reject it, and their act was final. It required not the

affirmance, and could not be negated by the State governments. The Constitution, when thus adopted, was of complete obligation, and bound the State sovereignties.

It has been said that the people had already surrendered all their powers to the State sovereignties, and had nothing more to give. But surely the question, whether they may resume and modify the powers granted to government, does not remain to be settled in this country. Much more might the legitimacy of the General Government be doubted had it been created by the States. The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty created by themselves. To the formation of a league, such as was the Confederation, the State sovereignties were certainly competent. But when, "in order to form a more perfect Union," it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.

That the government can exercise only those powers granted to it is now universally admitted; the extent of those powers will always be a question.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all

those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question, respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise as long as our system shall exist.

In discussing these questions, the conflicting powers of the General and State governments must be brought into view, and the supremacy of their respective laws, when they are in opposition, must be settled.

If any one proposition could command the universal assent of mankind, we might expect it would be this — that the government of the Union, though limited in its powers, is supreme within its sphere of action. This would seem to result necessarily from its nature. It is the government of all; its powers are delegated by all; it represents all, and acts for all. Though any one State may be willing to control its operations, no State is willing to allow others to control them. The Nation, on those subjects on which it can act, must necessarily bind its component parts. But this question is not left to mere reason; the people have in express terms decided it by saying, "This Constitution, and the laws of the United States which shall be made in pursuance thereof," "shall be the supreme law of the land," and by requiring that the members of the State Legislatures, and the officers of the executive and judicial departments of the States, shall take the oath of fidelity to it.

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, "any-

Government of the
United States is su-
preme.

thing in the Constitution or laws of any State to the contrary notwithstanding."

Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States, or to the people;" thus leaving the question, whether the particular power which may become the subject of contest has been delegated to the one government or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A

Impossible for Constitution to enumerate in detail its powers; only its great outlines should be marked.

Constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature therefore requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this idea was entertained by the framers of

the American Constitution is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced?

That this was the intention of the framers of the Constitution is proved by the ninth section of article 1.

It is also in some degree warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget that it is *a Constitution* we are expounding.

Although among the enumerated powers of government we do not find the word "bank" or "incorporation," we find the great powers to lay and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the Nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But

it may with great reason be contended that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of

Reasonable to suppose that government with such ample powers must be intrusted with means for their execution.

the Nation so vitally depend, must also be intrusted with ample means for their execution. The power being given, it is the interest of the Nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the

Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the Nation may require that the treasure raised in the north should be transported to the South, that raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is then the subject of fair inquiry, how far such means may be employed.

It is not denied that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue and applying it to National purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the Nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means, or that it may employ the most convenient means, if to employ them it be necessary to erect a corporation.

On what foundation does this argument rest? On this alone: The power of creating a corporation is one apper-

It is contended by the counsel for defendant that powers given to the government imply ordinary means of execution, but the government has no choice of means.

taining to sovereignty, and is not expressly conferred on Congress. This is true. But all legislative powers appertain to sovereignty. The original power of giving the law on any subject whatever is a sovereign power; and if the government of the Union is restrained from creating a corporation, as a means for performing its functions, on the single reason that the creation of a corporation is an act of sovereignty; if the sufficiency of this reason be acknowledged, there would be some difficulty in sustaining the authority of Congress to pass other laws for the accomplishment of the same objects.

The government which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means; and those who contend that it may not select any appropriate means, that one particular mode of effecting the object is excepted, take upon themselves the burden of establishing that exception.

If the government has the right to do an act it has also the power to select the means of doing it.

The creation of a corporation, it is said, appertains to sovereignty. This is admitted. But to what portion of sovereignty does it appertain? Does it belong to one more than to another? In America the powers of sovereignty are divided between the government of the Union and those of the States. They are each sovereign with respect to the objects committed to it, and neither sovereign with respect to the objects committed to the other. We cannot comprehend that train of reasoning which would maintain that the extent of power granted by the people is to be ascertained not by the nature and terms of the grant, but by its date. Some State Constitutions were formed before, some since that of the United

States. We cannot believe that their relation to each other is in any degree dependent upon this circumstance. Their respective powers must, we think, be precisely the same as if they had been formed at the same time. Had they been formed at the same time, and had the people conferred on the General Government the power contained in the Constitution, and on the States the whole residuum of power, would it have been asserted that the government of the Union was not sovereign with respect to those objects which were intrusted to it, in relation to which its laws were declared to be supreme? If this could not have been asserted, we cannot well comprehend the process of reasoning which maintains that a power appertaining to sovereignty cannot be connected with that vast portion of it which is granted to the General Government, so far as it is calculated to subserve the legitimate objects of that government. The power of creating a corporation, though appertaining to sovereignty, is not like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but the means by which their objects are accomplished.¹ No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as afford-

Power of creating a corporation distinguished from the power of levying war, etc.

¹ Tucker on Const. of U. S., I, 369.

ing the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is therefore perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means for the execution of the powers conferred on the government to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper for carry-
" Necessary and proper " clause.
 ing into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department thereof."¹

The counsel for the State of Maryland have urged various arguments to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend that this clause was inserted for the purpose of conferring on Congress the power of making laws; that without it doubts might be entertained whether Congress could exercise its powers in the form of legislation.

¹ Tucker on Const. of U. S., I, 367, 368; Cooley Const. Lim. 68; Story, Const., I, ch. V, 480 and note 2, 481; III, ch. XXV, § 1257; Federalist, Nos. XXXIII, XLIV; Thorpe, Const. of U. S., I, 525; Miller, Const. of U. S., 143, 144; Hepburn v. Griswold, 8 Wall. 603, 614, 615; Legal Tender Cases, 12 Wall. 457; Slaughter House Cases, 16 Wall. 36.

But could this be the object for which it was inserted? A government is created by the people, having legislative, executive, and judicial powers. Its legislative powers are vested in a Congress, which is to consist of a Senate and House of Representatives. Each House may determine the rule of its proceedings; and it is declared that every bill which shall have passed both Houses shall, before it becomes a law, be presented to the President of the United States. The seventh section describes the course of proceedings by which a bill shall become a law; and then the eighth section enumerates the powers of Congress. Could it be necessary to say that a Legislature should exercise legislative powers in the shape of legislation? After allowing each House to prescribe its own course of proceeding, after describing the manner in which a bill should become a law, would it have entered into the mind of a single member of the convention that an express power to make laws was necessary to enable the Legislature to make them? That a Legislature endowed with legislative powers can legislate is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "*necessary*" is considered as controlling the whole sentence, and as limiting the right to pass laws, for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory; that it excludes the choice of means, and leaves to Con-

Discussion of this clause.

Idem.

gress, in each case, that only which is most direct and simple.

Is it true that this is the sense in which the word "necessary" is always used? Does it always import an absolute, physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it fre- *Idem.* quently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means without which the end would be entirely unattainable. Such is the character of human language that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive should be understood in a more mitigated sense,—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases. This comment on the word is well illustrated by the passage cited at the

bar from the tenth section of the first article of the Constitution. It is, we think, impossible to compare the sentence, which prohibits a State from laying "imposts, or duties on imports or exports, except *what may be absolutely* necessary for executing its inspection laws," with that which authorizes Congress "to make all laws which shall be necessary and proper for carrying into execution" the powers of the General Government, without feeling a conviction that the convention understood itself to change materially the meaning of the word "necessary," by prefixing the word "absolutely." This word, then, like others, is used in various senses; and in its construction, the subject, the context, the intention of the person using them, are all to be taken into view.

Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a Constitution intended to endure for ages to come, and, consequently, to be adapted to the various crises of human affairs. To have prescribed the means by which government should in all future time execute its powers would have been to change entirely the character of the instrument, and give it the properties of a legal code. It would have been an unwise attempt to provide, by immutable rules, for exigencies which, if foreseen at all, must have been seen dimly, and which can be best provided for as they

occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the Legislature of the capacity to avail itself of experience to exercise its reason, and to accommodate its legislation to circumstances. If we apply this principle of construction to any of the powers of the government, we shall find it so pernicious in its operation that we shall be compelled to discard it. The powers vested in Congress may certainly be carried into execution without prescribing an oath of office. The power to exact this security for the faithful performance of duty is not given, nor is it indispensably necessary. The different departments may be established, taxes may be imposed and collected, armies and navies may be raised and maintained, and money may be borrowed, without requiring an oath of office. It might be argued, with as much plausibility as other incidental powers have been assailed, that the convention was not unmindful of this subject. The oath which might be exacted — that of fidelity to the Constitution — is prescribed, and no other can be required. Yet he would be charged with insanity who should contend that the Legislature might not superadd to the oath directed by the Constitution such other oath of office as its wisdom might suggest.

So with respect to the whole penal code of the United States; whence arises the power to punish in cases not prescribed by the Constitution? All admit that the government may legitimately punish any violation of its laws; and yet this is not among the enumerated powers of Congress. The right to enforce the

Whence arises the power to punish under the penal code in cases not prescribed by the Constitution?

observance of law, by punishing its infraction, might be denied with the more plausibility, because it is expressly given in some cases. Congress is empowered "to provide for the punishment of counterfeiting the securities and current coin of the United States," and "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations." The several powers of Congress may exist, in a very imperfect state to be sure, but they may exist and be carried into execution, although no punishment should be inflicted in cases where the right to punish is not expressly given.

Take, for example, the power "to establish post-offices and post-roads." This power is executed by the single act of making the establishment. But from this has been

Power "to establish post-offices and post-roads."

inferred the power and duty of carrying the mail along the post-road, from one post-office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post-office, or rob the mail. It may be said, with some plausibility, that the right to carry the mail, and to punish those who rob it, is not indispensably necessary to the establishment of a post-office and post-road. This right is, indeed, essential to the beneficial exercise of the power, but not indispensably necessary to its existence. So of the punishment of the crimes of stealing or falsifying a record or process of a court of the United States, or of perjury in such court. To punish these offenses is certainly conducive to the due administration of justice. But courts may exist, and may decide the causes brought before them, though such crimes escape punishment.

The baneful influence of this narrow construction on all the operations of the government, and the absolute

impracticability of maintaining it without rendering the government incompetent to its great objects, might be illustrated by numerous examples drawn from the Constitution and from our laws. The good sense of the public has pronounced, without hesitation, that the power of punishment appertains to sovereignty, and may be exercised whenever the sovereign has a right to act, as incidental to his constitutional powers. It is a means for carrying into execution all sovereign powers, and may be used, although not indispensably necessary. It is a right incidental to the power, and conducive to its beneficial exercise.

Narrow construction
has a baneful influence.

If this limited construction of the word "necessary" must be abandoned in order to punish, whence is derived the rule which would reinstate it, when the government would carry its powers into execution by means not vindictive in their nature? If the word "necessary" means "needful," "requisite," "essential," "conductive to," in order to let in the power of punishment for the infraction of law, why is it not equally comprehensive when required to authorize the use of means which facilitate the execution of the powers of government without the infliction of punishment.

Construction of word
"necessary."

In ascertaining the sense in which the word "necessary" is used in this clause of the Constitution, we may derive some aid from that with which it is associated. Congress shall have power "to make all laws which shall be necessary and *proper* to carry into execution" the powers of the government. If the word "necessary" was used in that strict and rigorous sense for which the counsel for the State of Maryland contend, it would be an extraordinary departure from the usual

Idem.

course of the human mind, as exhibited in composition, to add a word, the only possible effect of which is to qualify that strict and rigorous meaning; to present to the mind the idea of some choice of means of legislation not straitened and compressed within the narrow limits for which gentlemen contend.

But the argument, which most conclusively demonstrates the error of the construction contended for by the counsel for the State of Maryland, is founded on the intention of the convention, as manifested in the whole clause. To waste time and argument in proving that, without it, Congress might carry its powers into execution, would be not much less idle than to hold a lighted taper to the sun. As little can it be required to prove, that, in the absence of this clause, Congress would have some choice of means; that it might employ those which in its judgment would most advantageously effect the object to be accomplished; that any means adapted to the end, any means which tended directly to the execution of the constitutional powers of the government, were in

Reasons why the construction of the clause by State of Maryland is wrong.

themselves constitutional. This clause, as construed by the State of Maryland, would abridge and almost annihilate this useful and necessary right of the Legislature to select its means. That this could not be intended is, we should think, had it not been already controverted, too apparent for controversy. We think so for the following reasons:

1st. The clause is placed among the powers of Congress, not among the limitations on those powers.

2d. Its terms purport to enlarge, not to diminish, the powers vested in the government. It purports to be an additional power, not a restriction on those already granted. No reason has been or can be assigned for thus

concealing an intention to narrow the discretion of the National Legislature under words which purport to enlarge it. The framers of the Constitution wished its adoption, and well knew that it would be endangered by its strength, not by its weakness. Had they been capable of using language which would convey to the eye one idea, and, after deep reflection, impress on the mind another, they would rather have disguised the grant of power than its limitation. If, then, their intention had been by this clause to restrain the free use of means which might otherwise have been implied, that intention would have been inserted in another place, and would have been expressed in terms resembling these: "In carrying into execution the foregoing powers, and all others," etc., "no laws shall be passed but such as are necessary and proper." Had the intention been to make this clause restrictive, it would unquestionably have been so in form as well as in effect.

The result of the most careful and attentive consideration bestowed upon this clause is, that, if it does not enlarge, it cannot be construed to restrain, the powers of Congress, or to impair the right of the Legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the

Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional.¹

Well-known canon of Marshall here given.

That a corporation must be considered as a means not less usual, not of higher dignity, not more requiring a particular specification, than other means, has been sufficiently proved. If we look to the origin of corporations, to the manner in which they have been framed in that government from which we have derived most of our legal principles and ideas, or to the uses to which they have been applied, we find no reason to suppose that a Constitution, omitting, and wisely omitting, to enumerate all the means for carrying into execution the great powers vested in government, ought to have specified this. Had it been intended to grant this power as one which should be distinct and independent, to be exercised in any case whatever, it would have found a place among the enumerated powers of the government. But being considered merely as a means, to be employed only for the purpose of carrying into execution the given powers, there could be no motive for particularly mentioning it.

The propriety of this remark would seem to be generally acknowledged by the universal acquiescence in the

¹ Tucker, *Const. of U. S.*, I, 361, 367; *Legal Tender Cases*, 12 Wall. 457; *Slaughter-House Cases*, 16 Wall. 36; Thorpe, *Const. of U. S.*, II, 487; Miller, *Const. of U. S.*, 143, 144, 231, note.

construction which has been uniformly put on the third section of the fourth article of the Constitution. The power to "make all needful rules and regulations respecting the territory or other property belonging to the United States" is not more comprehensive than the power "to make all laws which shall be necessary and proper for carrying into execution" the powers of the government. Yet all admit the constitutionality of a territorial government, which is a corporate body.

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations is not now a subject of controversy. All those who have been concerned in the administration of our finances have concurred in representing its importance and necessity; and so strongly have they been felt that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the Nation. Under the Confederation, Congress, justifying the measure by its necessity, transcended, perhaps, its powers, to obtain the advantage of a bank; and our own legislation attests the universal conviction of the utility of this measure. The time has passed away when it can be necessary to enter into any discussion in order to prove the importance of this instrument as a means to effect the legitimate objects of the government.

But were its necessity less apparent, none can deny its being an appropriate measure; and if it is, the degree of its necessity, as has been very justly observed, is to be discussed in another place. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution; or should Congress, under the pretext of executing its powers, pass laws for the accomplishment of objects not intrusted to the government, it would become the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land. But where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and to tread on legislative ground. This court disclaims all pretensions to such a power.

After this declaration it can scarcely be necessary to say that the existence of State banks can have no possible influence on the question. No trace is to be found in the Constitution of an intention to create a dependence of the government of the Union on those of the States, for the execution of the great powers assigned to it. Its means are adequate to its ends; and on those means alone was it expected to rely for the accomplishment of its ends. To impose on it the necessity of resorting to means which it cannot control, which another government may furnish or withhold, would render its course precarious, the result of its measures uncertain, and create a dependence on other governments which might disappoint its most important designs, and is incompatible with the language of the Constitution. But were it otherwise, the choice of means implies a right to

choose a National bank in preference to State banks, and Congress alone can make the election.

After the most deliberate consideration, it is the unanimous and decided opinion of this court that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land.

Act to incorporate the Bank of United States is constitutional.

The branches, proceeding from the same stock, and being conducive to the complete accomplishment of the object, are equally constitutional. It would have been unwise to locate them in the charter, and it would be unnecessarily inconvenient to employ the legislative power in making those subordinate arrangements. The great duties of the bank are prescribed; those duties require branches; and the bank itself may, we think, be safely trusted with the selection of places where those branches shall be fixed; reserving always to the government the right to require that a branch shall be located where it may be deemed necessary.

It being the opinion of the court that the act incorporating the bank is constitutional, and that the power of establishing a branch in the State of Maryland might be properly exercised by the bank itself, we proceed to inquire —

2. Whether the State of Maryland may, without violating the Constitution, tax that branch?

That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have

The act incorporating the bank being constitutional, can the State of Maryland tax that branch of the bank?

never been denied. But such is the paramount character of the Constitution that its capacity to withdraw any subject from the action of even this power is admitted. The States are expressly forbidden to lay any duties on imports or exports, except what may be absolutely necessary for executing their inspection laws. If the obligation of this prohibition must be conceded,— if it may restrain a State from the exercise of its taxing power on imports and exports, the same paramount character would seem to restrain, as it certainly may restrain, a State from such other exercise of this power as is in its nature incompatible with and repugnant to the constitutional laws of the Union. A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used.

On this ground the counsel for the bank place its claim to be exempted from the power of a State to tax its operations. There is no express provision for the case, but the claim has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds.

This great principle is, that the Constitution and the laws made in pursuance thereof are supreme; that they control the Constitution and laws of the respective States, and cannot be controlled by them. From this, which may be almost termed an axiom, other propositions are deduced as corollaries, on the truth or error of which, and on their application to this case, the cause has been supposed to depend. These are, 1st. That a power to create implies a power to preserve. 2d. That a power to destroy, if wielded by a different hand, is hostile to and incom-

patible with these powers to create and to preserve. 3d. That, where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme.

These propositions, as abstract truths, would, perhaps, never be controverted. Their application to this case, however, has been denied; and both in maintaining the affirmative and the negative, a splendor of eloquence, and strength of argument, seldom, if ever, surpassed, have been displayed.

The power of Congress to create, and of course to continue, the bank, was the subject of the preceding part of this opinion, and is no longer to be considered as questionable.

That the power of taxing it by the States may be exercised so as to destroy it is too obvious to be denied.¹ But taxation is said to

States might tax bank out of existence.

be an absolute power, which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it. But the very terms of this argument admit that the sovereignty of the State, in the article of taxation itself, is subordinate to and may be controlled by the Constitution of the

¹ Tucker, Const. of U. S., I, 494, says: "A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent, imposed by the United States on the circulation of all other banks than the national banks, drove out of existence every State bank of circulation within a year or two after its passage." Miller also says: "It was a terse statement of a great truth which was made by Chief Justice Marshall in the great case, in regard to the United States Bank, that the power to tax, where unlimited, was the power to destroy. This may at first appear to have been a rather strong statement, but it was not." Const. of U. S. 256.

United States. How far it has been controlled by that instrument must be a question of construction. In making this construction no principle not declared can be admissible which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied in it, that the expression of it could not make it more certain. We must, therefore, keep it in view while construing the Constitution.

The argument on the part of the State of Maryland is, Contention by the State of Maryland. not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Constitution leaves them this right in the confidence that they will not abuse it.

Before we proceed to examine this argument, and to subject it to the test of the Constitution, we must be permitted to bestow a few considerations on the nature and extent of this original right of taxation which is acknowledged to remain with the States. It is admitted that the power of taxing the people and their property is essential to the very existence of government, and may be legitimately exercised on the objects to which it is applicable, to the utmost extent to which the government may choose to carry it. The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the Legislature acts upon its constituents. This is in general a sufficient security against erroneous and oppressive taxation.

The people of a State, therefore, give to their government a right of taxing themselves and their property; and as the exigencies of government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator, and on the influence of the constituents over their representative, to guard them against its abuse. But the means employed by the government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory. Those means are not given by the people of a particular State, not given by the constituents of the Legislature which claim the right to tax them, but by the people of all the States. They are given by all, for the benefit of all, and upon theory should be subjected to that government only which belongs to all.

It may be objected to this definition that the power of taxation is not confined to the people and property of a State. It may be exercised upon every object brought within its jurisdiction.

This is true. But to what source do we trace this right? It is obvious that it is an incident of sovereignty, and is co-extensive with that to which it is an incident. All subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation. This proposition may almost be pronounced self-evident.

The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable that it does not. Those

powers are not given by the people of a single State. They are given by the people of the United States, to a government whose laws, made in pursuance of the Constitution, are declared to be supreme. Consequently the people of a single State cannot confer a sovereignty which will extend over them.

If we measure the power of taxation residing in a State by the extent of sovereignty which the people of a single State possess and can confer on its government, we have an intelligible standard, applicable to every case to which the power may be applied. We have a principle which leaves the power of taxing the people and property of a State unimpaired; which leaves to a State the command of all its resources; and which places beyond its reach all those powers which are conferred by the people of the United States on the government of the Union, and all those means which are given for the purpose of carrying those powers into execution. We have a principle which is safe for the States, and safe for the Union. We are relieved, as we ought to be, from clashing sovereignty, from interfering powers, from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up, from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry, so unfit for the judicial department, What degree of taxation is the legitimate use, and what degree may amount to the abuse of the power? The attempt to use it on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse, because it is the usurpation of a power which the people of a single State cannot give.

We find, then, on just theory, a total failure of this original right to tax the means employed by the government of the Union for the execution of its powers. The right never existed, and the question, whether it has been surrendered, cannot arise.

But, waiving this theory for the present, let us resume the inquiry, whether this power can be exercised by the respective States, consistently with a fair construction of the Constitution.

That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. But all inconsistencies are to be reconciled by the magic of the word CONFIDENCE. Taxation, it is said, does not necessarily and unavoidably destroy. To carry it to the excess of destruction would be an abuse, to presume which would banish that confidence which is essential to all government.

But is this a case of confidence? Would the people of any one State trust those of another with a power to control the most insignificant operations of their State government? We know they would not. Why, then, should we suppose that the people of any one State should be willing to trust those of another with a power to control the operations of a government to which they have confided their most important and most valuable interests? In the Legislature of the Union alone are all represented. The Legislature of the Union alone, therefore, can be trusted by the people with the power of

controlling measures which concern all, in the confidence that it will not be abused. This, then, is not a case of confidence, and we must consider it as it really is.¹

If we apply the principle for which the State of Maryland contends to the Constitution generally, we shall find it capable of changing totally the character of that instrument. We shall find it capable of arresting all the measures of the government, and of prostrating it at the foot of the States. The American people have declared their Constitution, and the laws made in pursuance thereof, to be supreme; but this principle would transfer the supremacy, in fact, to the States.

What would result if the principle contended for by State of Maryland had effect.

If the States may tax one instrument employed by the government in the execution of its powers, they may tax any and every other instrument. They may tax the mail; they may tax the mint; they may tax patent rights; they may tax the papers of the custom-house; they may tax judicial process; they may tax all the means employed by the government, to an excess which would defeat all the ends of government. This was not intended by the American people. They did not design to make their government dependent on the States.

Gentlemen say they do not claim the right to extend State taxation to these objects. They limit their pretensions to property. But on what principle is this distinction made? Those who make it have furnished no reason for it, and the principle for which they contend denies it.

¹ "It follows as a logical result from this doctrine that if the Congress of the Union may constitutionally create a Bank of the United States as an agency of the National Government in the accomplishment of its constitutional purposes, any power of the States to tax such bank, or its property, or the means of performing its functions, is precluded by necessary implication." Cooley, *Const. Lim.*, p. 482.

They contend that the power of taxation has no other limit than is found in the tenth section of the first article of the Constitution; that with respect to everything else the power of the States is supreme, and admits of no control. If this be true, the distinction between property and other subjects to which the power of taxation is applicable is merely arbitrary and can never be sustained. This is not all. If the controlling power of the States be established; if their supremacy as to taxation be acknowledged; what is to restrain their exercising this control in any shape they may please to give it? Their sovereignty is not confined to taxation. That is not the only mode in which it might be displayed. The question is, in truth, a question of supremacy; and if the right of the States to tax the means employed by the General Government be conceded, the declaration that the Constitution and the laws made in pursuance thereof shall be the supreme law of the land is empty and unmeaning declamation.

In the course of the argument *The Federalist* has been quoted, and the opinions expressed by the authors of that work have been justly supposed to be entitled to great respect in expounding the Constitution. No tribute can be paid to them which exceeds their merit. But in applying their opinions to the cases which may arise in the progress of our government a right to judge of their correctness must be retained, and to understand the argument we must examine the proposition it maintains and the objections against which it is directed. The subject of those numbers from which passages have been cited is the unlimited power of taxation which is vested in the General Government. The objection to this unlimited

power, which the argument seeks to remove, is stated with fullness and clearness. It is, "that an indefinite power of taxation in the latter (the government of the Union) might, and probably would in time, deprive the former (the government of the States) of the means of providing for their own necessities; and would subject them entirely to the mercy of the National Legislature. As the laws of the Union are to become the supreme law of the land; as it is to have power to pass all laws that may be necessary for carrying into execution the authorities with which it is proposed to vest it; the National Government might at any time abolish the taxes imposed for State objects upon the pretense of an interference with its own. It might allege a necessity for doing this in order to give efficacy to the National revenues, and thus all the resources of taxation might by degrees become the subjects of Federal monopoly to the entire exclusion and destruction of the State governments."

The objections to the Constitution which are noticed in these numbers were to the undefined power of the government to tax, not to the incidental privilege of exempting its own measures from State taxation. The consequences apprehended from this undefined power were that it would absorb all the objects of taxation, "to the exclusion and destruction of the State governments." The arguments of *The Federalist*¹ are intended to prove the fallacy of these apprehensions; not to prove that the government was incapable of executing any of its powers, without exposing the means it employed to the embarrassments of State taxation. Arguments urged against these objections and these apprehensions are to be understood as relating to the points they mean to prove. Had

¹ Nos. XXX-XXXIII.

the authors of those excellent essays been asked whether they contended for that construction of the Constitution which would place within the reach of the States those measures which the government might adopt for the execution of its powers, no man who has read their instructive pages will hesitate to admit that their answer must have been in the negative.

It has also been insisted, that, as the power of taxation in the General and State governments is acknowledged to be concurrent, every argument, which would sustain the right of the General Government to tax banks chartered by the States, will equally sustain the right of the States to tax banks chartered by the General Government.

But the two cases are not on the same reason. The people of all the States have created the General Government, and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and by their representatives exercise this power. When they tax the chartered institutions of the States, they tax their constituents; and these taxes must be uniform. But when a State taxes the operations of the government of the United States, it acts upon institutions created, not by their own constituents, but by people over whom they claim no control. It acts upon the measures of a government created by others, as well as themselves, for the benefit of others in common with themselves. The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole,—between the laws of a government declared to be supreme, and those of a government which, when in opposition to those laws, is not supreme.

But if the full application of this argument could be admitted, it might bring into question the right of Congress to tax the State banks, and could not prove the right of the States to tax the Bank of the United States.

The court has bestowed on this subject its most deliberate consideration. The result is a conviction that the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. This is, we think, the unavoidable consequence of that supremacy which the Constitution has declared.

We are unanimously of opinion that the law passed by the Legislature of Maryland imposing a tax on the Bank of the United States is unconstitutional and void.

This opinion does not deprive the States of any resources which they originally possessed. It does not extend to a tax paid by the real property of the bank, in common with the other real property within the State, nor to a tax imposed on the interest which the citizens of Maryland may hold in this institution, in common with other property of the same description throughout the State. But this is a tax on the operations of the bank, and is consequently a tax on the operation of an instrument employed by the government of the Union to carry its powers into execution. Such a tax must be unconstitutional.

NOTE

“In further illustration of the permanent value and effect of Marshall’s constitutional decisions I shall next refer to what was at the time known as the Bank case

(reported under the name of *M'Culloch* against Maryland, decided in 1819). It presented questions underlying the very existence of the government of the Union. Its decision not only determined the conflicting claims of the General and the State governments on points of great moment, but also laid down the true principles of construction by which the respective limits of their powers are ascertained, and it is, moreover, among the most striking examples of the wisdom of the framers of the Constitution in constituting the Supreme Court of the United States the tribunal to determine finally and peacefully competing pretensions of the States and the General Government. The case was, in fact, a controversy between the United States and the State of Maryland, and involved, on the one hand, the constitutionality of an act of Congress, and on the other, the constitutionality of a revenue statute of the State.

"The war of 1812 was followed by a period of great financial distress, during which Congress rechartered, in 1816, the Bank of the United States as a fiscal agency of the government. The act was approved by President Madison. The Constitution contains no express power to charter a bank or to create any corporation, and under the principle of strict construction (that no power exists unless expressly granted), the act would be unconstitutional, and such was the contention of the State of Maryland. Branches of the principal bank were established in several States, among others, in 1817, in Maryland, and had power to issue notes to circulate as money. The Legislature of Maryland, the next year, enacted a statute taxing all banks or branches thereof located in that State not chartered by its Legislature by requiring that notes issued by them should be upon stamped paper of the State. This legislation was aimed at the branch bank and was probably intended to tax it out of existence in the State of Maryland. The government claimed that this act, if applied to the branch bank in Maryland, was repugnant to the Constitution of the United States, and was, therefore, void. The branch bank having refused to pay the tax, an action was brought to recover the amount thereof against Mr. *M'Culloch*, its cashier; and this was the case which was finally presented for the decision of the Supreme Court of the United States, to which it was carried

from the judgment of the Supreme Court of Maryland in favor of the State and against the bank.

"The momentous questions which lay at the foot of this controversy were fully appreciated at the time. The case attracted universal attention. Appreciating that the fundamental principles of the government were at stake, the opinion of the Chief Justice is one of the ablest and most elaborately reasoned which he ever pronounced. Concerning the bank, the court held that it had been chartered by Congress as an instrumentality to carry on the financial operations of the government, and that although the power to create a bank for such purpose was not expressly found in the Constitution, yet it was implied in the great powers to levy and collect taxes, to borrow money, to regulate commerce, to declare and conduct a war, and to raise and support armies; and that these powers being given, Congress had the right to select or create any appropriate means to facilitate the execution thereof.

"The tests by which to determine the extent of the implied powers of the General Government as laid down in this opinion are not now questioned or denied. After this decision the question as to creating a national bank became one wholly of legislative policy. As we know, a bill for that purpose, passed by Congress in 1836, was vetoed by President Jackson partly on the ground that it was unconstitutional. This presented, of course, no question for judicial review. Many years afterwards, however (1863), the existing system of national banks was created by Congress, to the great benefit of the country, and at this day no one I think seriously doubts the power of Congress to enact legislation of this character.

"The other question in the case as to the power of the State to tax the bank is in its principles equally important. The claim of the State was more than plausible; it was one not a little difficult to answer. The State said, in effect: 'We are sovereign. Taxation of all persons and property within our limits belongs to sovereignty; and there being no prohibition in the Federal Constitution against the exercise of this vital power on the part of the State, it remains in all its amplitude uncurtailed in the several States.'

"But Marshall held that this claim on the part of the State was fully answered by the principle already announced, namely, that the bank was rightfully established as a fiscal agency of the General Government, and that this excluded, by necessary implication, the right of the State to levy a tax against its operations without the consent of Congress, since unlimited power to tax involved the power to destroy. 'If,' said Marshall, 'the States may tax one instrument employed by the General Government in the execution of its powers, they may tax any and every other instrument which would defeat the ends of the General Government. This was not intended by the American people. They did not design to make their government dependent on the States.'

"This principle has since been applied to many subjects other than taxation; and a long line of adjudications in the Supreme Court has resulted in the establishment of the general doctrine so essential to the maintenance of the government — that the States cannot in any manner control the General Government in its legislation or operations when acting within the sphere of its constitutional powers, and that any interfering legislation on their part is unconstitutional and void. The States cannot lay the weight of their little finger upon the powers of the General Government. The views of the Chief Justice on both branches of this case are now everywhere accepted and unquestioned, and their general adoption is among the most splendid and useful triumphs of Marshall's genius. As a complementary doctrine it may be stated that the Supreme Court, in other cases, have decided that the United States cannot tax, control or interfere with the agencies or instrumentalities of the States."¹

Speaking of the opinion of Chief Justice Marshall in this case, Justice Miller says: "It takes in a very wide range with regard to the nature and power of the Federal Government, and the principles of construction of the Constitution. It is one of the ablest of the opinions delivered by Chief Justice Marshall, and has often been referred to and followed in subsequent cases." Miller, Const. of U. S. 389.

Again referring to this case, the same great constitu-

¹ Marshall Memorial, I, 370-374, address of John F. Dillon.

tional judge says: "It is unnecessary for me to point out the great influence which that decision of the Supreme Court has exercised over the material and financial prosperity of this country. Had the decision been, that there existed in this government no power to create a national currency, or to provide for a national banking system, the disastrous effects upon the business prosperity of the people can hardly be imagined. Those who are old enough to have gone through the State bank and wild-cat systems of paper money prevalent a few years since in this country,¹ can bear feeling testimony to the value of a so-called national bank system." Miller, Const. of U. S. 391.

"It is a matter of interest, which I cannot forbear to mention here, that the present national bank system, which in my judgment, and in that of many thinking men, statesmen and financiers, is the best that the world has ever seen, originated during the midst of the civil war with the Secretary of the Treasury who afterwards came to Marshall's place as Chief Justice of the Supreme Court of the United States." Miller, Const. of U. S. 390, 391.

"Just prior to the expiration of the charter of this bank (referring to *M'Culloch v. Maryland*) in 1836, the question of its renewal became one of absorbing public interest. The then President of the United States, General Jackson, brought all his influence and popularity to bear to prevent a renewal of its charter, and the questions entered into the partisan politics of the day more largely than any other, and to some extent continued to do so until the late war. The Congress of 1836 passed the bill for the recharter of the bank, but President Jackson vetoed it, largely on the ground that it was unconstitutional. It may be said, however, that the prevailing sentiment of the country, and especially of its leading statesmen, has been in the main favorable to the constitutionality of the United States Bank; and no decision of the Supreme Court, or of any other court of

¹ For a history of "Wild Cat Currency" in this country, see Von Holst, Const. Law of U. S. 126, note; McMaster, Hist. of People of U. S., V, 160 *et seq.*; Bancroft, Hist. of Const. of U. S., I, book 2, ch. 6; author's *Last Revise*, VI, 167; Thorpe's Const. Hist. of the U. S., II, 510-512.

the United States, has ever impugned or denied the correctness of the principle upon which the case was decided." Miller, Const. of U. S. 390. See also Thorpe, Const. History of U. S., II, 474, Magruder's "John Marshall," 194-198.

"A case could not be selected from the decisions of the Supreme Court of the United States superior to this one of *M'Culloch v. Maryland* for the clear and satisfactory manner in which the supremacy of the laws of the Union have been maintained by the court, and an undue assertion of State power overruled and defeated." Kent, Com. (12th ed.), I, 427.

"No other decision by the Supreme Court gives so clear and satisfactory a statement of the supreme character of national laws." Thorpe, Const. Hist. of U. S., II, 487.

"If we regard at once the greatness of the questions at issue in the particular case, the influence of the opinion, and the large method and clear and skilful manner in which it is worked out, there is nothing so fine as the opinion in *M'Culloch v. Maryland*." Prof. James B. Thayer, "John Marshall," 85; Marshall Memorial, I, 234.

REFERENCES TO M'CULLOCH v. MARYLAND, IN MARSHALL MEMORIAL

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*CONSTITUTIONAL SANCTITY OF CONTRACTS —
THEIR INVIOABILITY BY THE STATES.*

The next case — known as the Dartmouth College Case,— by its construction of the Federal Constitution incorporated into American jurisprudence the principle that privileges and franchises granted by legislative act to a *private* corporation, when accepted and acted upon by the grantee, constitute a *contract* within the meaning of the clause of the Federal Constitution which secures the inviolability of contracts by ordaining that no State shall pass any law impairing their obligation; and consequently any subsequent law repealing or materially altering the charter of such a corporation is unconstitutional, unless the power to repeal or alter is reserved either specially or generally when the grant is made. No decision of the Supreme Court of the United States has been attended with more important practical consequences as respects both private contracts and legislative grants to corporations.

It is difficult to say which is the greatest or most important of Marshall's decisions.¹ They constitute a long range of mountainous magnitude, extending in a continuous reach from 1803 to 1835. Viewing them, one will exclaim: "Marbury's Case presents the highest and most impressive peak!" Others will say the same of *Gibbons v. Ogden*, or of *Cohens v. Virginia*; and still another of the *Maryland Bank Case*.

¹ "It is not uncommon to speak of the reasoning in *Marbury v. Madison*, and *Dartmouth College v. Woodward*, with the greatest praise. But neither of these is entitled to rank with Marshall's greatest work." Prof. James B. Thayer's "John Marshall," 84, *ante*, p. 256.

Considered in its vital relation to the fundamental conception and purposes of the Union of the States created by the Constitution, and having in view the consequences of an opposite decision at that early and precarious period of our national history, *Marbury's Case* may perhaps justly be considered the most permanently important of all, since it constitutes the basis of American Constitutional Law. Doubtless the Union thus constituted would have been imperiled by a contrary decision of the *Steamboat Case*; or that of *Cohens*; or that of the *Maryland Bank*. These decisions are all essential parts of a whole. Nevertheless, it is perhaps true that in solid, massive, intellectual grandeur, the opinion of the Chief Justice in the *Bank Case* is the one that towers the highest,—the first to reflect the rising and the last to catch the setting sun.

However the relative importance of these cases may be viewed, it is nevertheless true that the most famous of all is the *Dartmouth College Case*—famous in the sense of being more generally known to the public as well as to the profession. The comments on this case on *Marshall Day*, in the orations and addresses contained in the *Marshall Memorial*, show the estimate in which the *Dartmouth College Case* is held by the profession. Our national prosperity essentially rests upon the security of property and the inviolability of contracts.¹ Contracts are a species of property. The decision in the *Dartmouth College Case* placed the security of contracts upon the

¹Speaking in 1885 of the American Union and its unexampled career, Sir Henry Maine declared and confessed that "all this beneficent prosperity-reposes on the sacredness of contracts and the stability of private property; the first the implement, and the last the reward, of success in the general competition." *Essays on Popular Government*, p. 51 (American Edition), quoted *Laws and Jurisprudence of England and America*, Dillon, p. 211 (Little, Brown & Co.).

broadest possible basis. The Federal Constitution was there held not to limit its protective provisions to ordinary contracts between man and man, but to extend to legislative contracts as well; and to this extent its soundness and its beneficent operation and effect are undoubted.

The principle of the case has never been unsettled in State or National jurisprudence. The application of the principle as to legislative grants to corporations has been limited so as to confine it to cases where it is evident that both the State and the grantee of its franchises intended to make an actual contract based upon sufficient consideration binding upon the State — a contract which should not be subject to future legislation which would impair its obligation. The doctrine of that case as thus finally settled and as now applied by the Supreme Court rests upon a solid foundation, and the doctrine itself has been one of the chief causes of our national and private prosperity.

The effect of the decision has been much narrowed by the subsequent practice of the States in making legislative grants to corporations expressly to reserve the power to repeal, alter or modify the charter or franchises granted. This reservation is contained in the Constitutions of many of the States, or in general or special acts of their Legislatures. The effect of such a reservation is not unlimited. It simply puts charters conferring corporate capacity or grants upon the same footing as to amendment or repeal as other statutes. Such reservation, therefore, authorizes the State to do whatever it might do on sound constitutional principles if it were not for the prohibition in the Federal Constitution, but it does not authorize the State to take away or destroy vested rights which have been acquired under the charter or

grant, or which, by a legitimate use of the powers granted, have become vested in the corporation.¹

The general nature of the action in the Dartmouth College case appears in the opinion of Chief Justice Marshall.

The legal history of the case is as follows:

In the State Superior Court of New Hampshire, the highest court of the State, the case was first argued in May, 1817, by Jeremiah Mason and Jeremiah Smith for the plaintiffs (the *old* Board of Trustees who sued in their corporate name under the Royal Charter of 1769), and by George Sullivan and Ichabod Bartlett for Woodward (the defendant), who represented the *new* State Board appointed under the New Hampshire acts of 1816 amending the charter. In September, 1817, the cause was re-argued in the same court by the same counsel with the addition of Daniel Webster, then in the thirty-sixth year of his age. The arguments were able, and an examination of them shows they covered every legal point and every material consideration belonging to the cause. The Superior Court was constituted of Richardson, Chief Justice, and Bell and Woodbury, Justices, judges of learning and deserved distinction. In November, 1817, the judgment of this court was given for the defendant,

¹ *Miller v. State*, 15 Wallace, 478, per Mr. Justice Clifford; *Sinking Fund Cases*, 99 U. S. 700 (1878), per Waite, C. J.; *Id.*, per Strong, J., 740, 741; *Id.*, 758, per Field, J.; *Greenwood v. Freight Co.*, 105 U. S. 13; *Hamilton Gas Light & Coke Co. v. Hamilton City*, 146 U. S. 258; *People v. Cook*, 148 U. S. 397; *Adirondack Ry. Co. v. New York*, 160 N. Y. 225; *Citizens' Savings Bank v. Owensboro*, 173 U. S. 651. See also the great case of *People v. O'Brien, Receiver*, growing out of the Act of the Legislature of New York of 1886 repealing the charter of the Broadway Surface Railway Company, and dissolving that corporation, decided in the Court of Appeals (1888), 111 N. Y. 1; *Detroit v. Howell Plank Road Co.*, 43 Mich. 140, 147, per Cooley, J.

sustaining the constitutional validity of the State legislation of 1816. The opinion of Chief Justice Richardson was concurred in by his associates and is marked by great clearness, force and ability.

The New Hampshire court placed its judgment upon the grounds that the College was a *public* and not a private corporation, that the legislation of the State did not infringe any *private rights or property* of the trustees (the corporate plaintiffs), and that the charter of 1769 was *not a contract* within the meaning of the clause of the Federal Constitution prohibiting "a State from impairing the obligation of contracts." This clause was in the opinion of the court only "intended to protect private rights of property and all contracts relating to private property, but not to limit the power of the States over their public officers and servants or their own civil institutions, nor over grants of power and authority by a State to individuals to be exercised for purposes merely public." The court was also of the opinion that if the charter of 1769 "can be construed to be a contract within the meaning of the Constitution of the United States, yet it contains no contract binding on the Legislature that the number of trustees shall not be augmented, and that the validity of the contract is not impaired by these acts" of 1816 amending the charter.

On the record on the appeal to the Supreme Court of the United States the only questions open for discussion in that court were the two stated by Chief Justice Marshall in his opinion, viz.: (1) whether the charter of 1769 is a contract protected by the Constitution of the United States, and (2) whether it is impaired by the State acts of 1816 under which the defendant Woodward holds.

The cause was argued in the Supreme Court in March,

1818, by Mr. Webster and Mr. Joseph Hopkinson of Philadelphia for the old board (the plaintiffs), and by Mr. John Holmes of Maine and Attorney General William Wirt for the new board (the defendant).

The cause was decided by the Supreme Court of the United States on the second day of the February term, 1819, Mr. Justice Todd being absent. The opinion of the court was pronounced by Chief Justice Marshall and is given below in full. Separate concurring opinions were delivered by Mr. Justice Washington and Mr. Justice Story. Mr. Justice Duvall alone dissented.

The legal history and literature of the case are very voluminous and are quite fully referred to in the Marshall Memorial. In addition to Mr. Wheaton's official report, a full report of the case was published by Timothy Farrar, Esq., in August, 1819, containing at length the pleadings, the Royal Charter, the special verdict, the State enactments of 1816 amending the charter, the arguments of the counsel in the Superior Court of New Hampshire, the opinion of that court, the arguments in the Supreme Court of the United States, the opinions in that court, and other matters.¹

The interest in the cause is perennial. In 1879 a learned and diligent lawyer of New Hampshire, Mr. John M. Shirley, embodied years of study and research in his work entitled "Dartmouth College Causes." The correspondence of Governor Plumer, Mr. Webster and others contains much interesting data relating to the cause.² Mr. Henry Cabot Lodge has grouped and summarized the leading facts and incidents of this *cause célèbre*

¹ See also reprint of Dartmouth College Case and arguments of counsel in the State Court, 65 New Hampshire Reports, pp. 478-497.

² See views of Judge Doe, 67 New Hampshire Reports, pp. 27-58; Marshall Memorial, I, 155.

with the skill of a literary artist and invested them with a living, personal, almost dramatic interest.¹

Many valuable and suggestive comments, historical, critical and general, on the cause were made by learned and eminent orators on Marshall Day, whose orations and addresses appear in the Marshall Memorial and are referred to in the note at the end of Chief Justice Marshall's opinion in the present volume. To these we cannot here refer at length, but the reader will be specially interested in the observations of Professor Jeremiah Smith of Harvard, a son of the distinguished Jeremiah Smith who argued the cause of the College in the Superior Court of the State,² and the remarks of President Tucker of Dartmouth, who frankly admits the dissensions in the College board and "that the State did not take the initiative — at least the moral initiative,— and did not of its own motion directly invade the rights of the College."³

¹ Daniel Webster, by Henry Cabot Lodge, ch. III, pp. 72-98, 9th ed.

See also Mr. Choate's classic Eulogy on Webster before Dartmouth College July 27, 1858, in the *Addresses and Orations of Rufus Choate*, Boston, 1887 (Little, Brown and Company), where the peroration of Mr. Webster in its "simple, sweet and perfect beauty," supplied by Professor Goodrich of Yale, is given (p. 271). See same volume, pp. 228, 229. Van Santvoord, *Lives of the Chief Justices, etc.*, pp. 394-398. For Mr. Webster's Argument revised by himself, but omitting the peroration and much illustrative matter, see *Webster's Works*, V, 482-501, edition 1851 (Little and Brown). Curtis, *George Ticknor, Life of Webster*, I, pp. 163-171. Mr. Webster's account of the arguments in the Supreme Court, see *Kennedy's Life of Wirt*, II, 82, 83; letter of Webster to Jeremiah Mason, March 13, 1818. *Webster's Private Correspondence*, I, 275; letter of same to Jeremiah Smith, March 14, 1818, *Id.* 276. Mr. Pinkney's Opinion of Wirt's Argument. *Flanders, Lives of Chief Justices* (ed. 1875), II, 447, note. Fiske, John, *Essays Historical and Literary*, I, 378-379, 1902.

² *Marshall Memorial*, I, 154-156.

³ *Marshall Memorial*, I, 183.

Trustees of Dartmouth College v. Woodward.

February Term, 1819.

[4 Wheaton's Reports, 518-715.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

The charter granted by the British Crown to the trustees of Dartmouth College, in New Hampshire, in the year 1769, is a contract within the meaning of that clause of the Constitution of the United States which declares that no State shall make any law impairing the obligation of contracts. The charter was not dissolved by the Revolution.

An act of the State Legislature of New Hampshire altering the charter, without the consent of the corporation, in a material respect, is an act impairing the obligation of the charter, and is unconstitutional and void.

That a corporation is established for purposes of general charity, or for education generally, does not, *per se*, make it a public corporation liable to the control of the Legislature.

Under its charter, Dartmouth College was a private and not a public corporation.

On December 13, 1769, the King of Great Britain granted a charter to Dartmouth College in the province of New Hampshire. This was done upon the representation that property would be given said college if chartered; and when chartered, property was so given. This charter incorporated the twelve persons therein

named and their successors by the name of "The Trustees of Dartmouth College." These were the plaintiffs in the action in their said corporate name and capacity. Under this charter the college went on, governed by trustees appointed in accordance with it, until 1816, when the Legislature of the State of New Hampshire passed three acts to amend this charter; which amendment the trustees declined to accept. The nature of these amendments is stated in the opinion of the Chief Justice. Woodward, the defendant, was secretary and treasurer of the college under the old charter; but was removed from his place as secretary in August, 1816, and from that of treasurer in September, 1816. In February, 1817, the new board of trustees was organized under the acts of 1816, and Woodward was appointed secretary and treasurer of the new board. He, as an officer under the old board, held the charter and other chattels of the college, and these he refused to give up to the old board. The old trustees in their corporate name thereupon sued him for these chattels, and judgment being given against them in the State courts, they now brought the case to the Supreme Court.¹

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice*.

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

BROCKHOLST LIVINGSTON,

THOMAS TODD,

GABRIEL DUVALL,

JOSEPH STORY,

} *Associate Justices.*

Mr. Justice Todd was absent on account of indisposition.

Mr. Daniel Webster and Mr. Joseph Hopkinson appeared for the plaintiffs in error.

Mr. John Holmes and Attorney-General William Wirt appeared for defendant in error.

On the 2d of February, 1819, the opinion of the court was delivered as follows:

MARSHALL, Chief Justice. This is an action of trover brought by the trustees of Dartmouth College against William H. Woodward, in the State court of New Hampshire, for the book of records, corporate seal, and other corporate property, to which the plaintiffs allege themselves to be entitled.

A special verdict, after setting out the rights of the parties, finds for the defendant, if certain acts of the Legislature of New Hampshire passed on the 27th of June and on the 18th of December, 1816, be valid and binding on the trustees without their assent, and not repugnant to the Constitution of the United States; otherwise it finds for the plaintiffs.

The Superior Court of Judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment has been brought before this court by writ of error. The single question now to be considered is: Do the acts to which the verdict refers violate the Constitution of the United States?

Are the legislative acts referred to in the verdict in violation of the Constitution of the United States?

This court can be insensible neither to the magnitude nor delicacy of this question. The validity of a legislative act is to be examined; and the opinion of the highest law tribunal of a State is to be revised; an opinion which carries with it intrinsic evidence of the diligence, of the ability, and the integrity with which it was formed. On more than one occasion this court has expressed the cautious circumspection with which it approaches the consideration of such questions; and has declared that in no doubtful case would it pronounce a legislative act to be

contrary to the Constitution. But the American people have said, in the Constitution of the United States, that "No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts." In the same instrument they have also said, "That the judicial power shall extend to all cases in law and equity arising under the Constitution." On the judges of this court, then, is imposed the high and solemn duty of protecting, from even legislative violation, those contracts which the Constitution of our country has placed beyond legislative control; and however irksome the task may be, this is a duty from which we dare not shrink.

The title of the plaintiffs originates in a charter dated the 13th day of December, in the year 1769, incorporating twelve persons therein mentioned, by the name of "The Trustees of Dartmouth College," granting to them and their successors the usual corporate privileges and powers, and authorizing the trustees, who are to govern the college, to fill up all vacancies which may be created in their own body.

Original charter
granted in 1769.

The defendant claims under three acts of the Legislature of New Hampshire, the most material of which was passed on the 27th of June, 1816, and is entitled, "An act to amend the charter, and enlarge and improve the corporation, of Dartmouth College." Among other alterations in the charter, this act increases the number of trustees to twenty-one, gives the appointment of the additional members to the Executive of the State, and creates a board of overseers, with power to inspect and control the most important acts of the trustees. This board consists of twenty-five persons. The President of the Senate, the Speaker of the House of Representatives of New Hampshire, and the Governor and

Acts to amend the
charter.

Lieutenant-Governor of Vermont, for the time being, are to be members *ex officio*. The board is to be completed by the Governor and Council of New Hampshire, who are also empowered to fill all vacancies which may occur. The acts of the 18th and 26th of December are supplemental to that of the 27th of June, and are principally intended to carry that act into effect.

The majority of the trustees of the college have refused to accept this amended charter, and have brought this suit for the corporate property, which is in possession of a person holding by virtue of the acts which have been stated.

Majority of trustees
refuse to accept the
amended charter.

It can require no argument to prove that the circumstances of this case constitute a contract. An application is made to the Crown for a charter to incorporate a religious and literary institution. In the application it is stated that large contributions have been made for the object, which will be conferred on the corporation as soon as it shall be created. The charter is granted, and on its faith the property is conveyed. Surely, in this transaction, every ingredient of a complete and legitimate contract is to be found.

The points for consideration are —

1. Is this contract protected by the Constitution of the United States?
2. Is it impaired by the acts under which the defendant holds?

The two questions to
be decided.

1. On the first point it has been argued that the word "contract" in its broadest sense would comprehend the political relations between the government and its citizens, would extend to offices held within a State for State purposes, and to many of those laws concerning civil in-

stitutions, which must change with circumstances, and be modified by ordinary legislation, which deeply concern the public, and which, to preserve good government, the public judgment must control. That even marriage is a contract, and its obligations are affected by the laws respecting divorces. That the clause in the Constitution, if construed in its greatest latitude, would prohibit these laws. Taken in its broad unlimited sense the clause would be an unprofitable and vexatious interference with the internal concerns of a State, would unnecessarily and unwisely embarrass its legislation, and render immutable those civil institutions which are established for purposes of internal government, and which, to subserve those purposes, ought to vary with varying circumstances. That, as the framers of the Constitution could never have intended to insert in that instrument

a provision so unnecessary, so mischievous, and so repugnant to its general spirit, the term "*contract*" must be understood in a more limited sense. That it must be understood as intended to guard against a power of at least doubtful utility, the abuse of which had been extensively felt; and to restrain the Legislature in future from violating the right to property. That, anterior to the formation of the Constitution, a course of legislation had prevailed in many, if not in all, of the States, which weakened the confidence of man in man, and embarrassed all transactions between individuals, by dispensing with a faithful performance of engagements. To correct this mischief, by restraining the power which produced it, the State Legislatures were forbidden "to pass any law impairing the obligation of contracts," that is, of contracts respecting property, under which some individual could

Term "*contract*" must be taken here in a limited sense.

claim a right to something beneficial to himself; and that, since the clause in the Constitution must in construction receive some limitation, it may be confined, and ought to be confined, to cases of this description, to cases within the mischief it was intended to remedy.

The general correctness of these observations cannot be controverted. That the framers of the Constitution did not intend to restrain the States in the regulation of their civil institutions, adopted for internal government, and that the instrument they have given us is not to be so construed, may be admitted. The provision of the Constitution never has been understood to embrace other contracts than those which respect property, or some object of value, and confer rights which may be asserted in a court of justice. It never has been understood to restrict the general right of the Legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties, because it has been broken by the other. When any State Legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time enough to inquire whether such an act be constitutional.

The parties in this case differ less on general principles, less on the true construction of the Constitution in the abstract, than on the application of those principles to this case, and on the true construction of the charter of 1769. This is the point on which the cause essentially depends. If the act of incorporation be a grant of political power, if it create a civil institution, to be employed in the administration of the government, or if the funds of the college be public property, or if the State of New

Hampshire, as a government, be alone interested in its transactions, the subject is one in which the Legislature of the State may act according to its own judgment, unrestrained by any limitation of its power imposed by the Constitution of the United States.

But if this be a private eleemosynary institution, endowed with a capacity to take property for objects unconnected with government, whose funds are bestowed by individuals, on the faith of the charter;

Distinction drawn between private eleemosynary institution and a civil institution — Different effect in this case.

if the donors have stipulated for the future disposition and management of those funds in the manner prescribed by themselves,—there may be more difficulty in the case, although neither the persons who have made these stipulations, nor those for whose benefit they were made, should be parties to the cause. Those who are no longer interested in the property may yet retain such an interest in the preservation of their own arrangements as to have a right to insist that those arrangements shall be held sacred. Or if they have themselves disappeared, it becomes a subject of serious and anxious inquiry, whether those whom they have legally empowered to represent them forever may not assert all the rights which they possessed while in being; whether, if they be without personal representatives who may feel injured by a violation of the compact, the trustees be not so completely their representatives in the eye of the law as to stand in their place, not only as respects the government of the college, but also as respects the maintenance of the college charter.

It becomes, then, the duty of the court most seriously to examine this charter and to ascertain its true character.

From the instrument itself it appears that, about the
History of the college— year 1754, the Rev. Eleazer Wheelock
Brief review of. established, at his own expense, and on
his own estate, a charity school for the instruction of In-
dians in the Christian religion. The success of this insti-
tution inspired him with the design of soliciting contribu-
tions in England for carrying on and extending his under-
taking. In this pious work he employed the Rev. Nathaniel
Whitaker, who, by virtue of a power of attorney from
Dr. Wheelock, appointed the Earl of Dartmouth and
others trustees of the money which had been and should be
contributed; which appointment Dr. Wheelock confirmed
by a deed of trust authorizing the trustees to fix on a
site for the college. They determined to establish the
school on Connecticut river, in the western part of New
Hampshire, that situation being supposed favorable for
carrying on the original design among the Indians, and
also for promoting learning among the English; and the
proprietors in the neighborhood having made large
offers of land, on condition that the college should there
be placed. Dr. Wheelock then applied to the Crown for
an act of incorporation, and represented the expediency
of appointing those, whom he had by his last will named
as trustees in America, to be members of the proposed
corporation. "In consideration of the premises," "for
the education and instruction of the youth of the Indian
tribes," etc., "and also of English youth, and any others,"
the charter was granted, and the trustees of Dartmouth
College were by that name created a body corporate,
with power, *for the use of the said college*, to acquire real
and personal property, and to pay the president, tutors,
and other officers of the college, such salaries as they
shall allow.

The charter proceeds to appoint Eleazer Wheelock, "the founder of said college," president thereof, with power by his last will to appoint a successor, who is to continue in office until disapproved by the trustees. In case of vacancy, the trustees may appoint a president, and in case of the ceasing of a president, the senior professor or tutor, *being one of the trustees*, shall exercise the office until an appointment shall be made. The trustees have power to appoint and displace professors, tutors, and other officers, and to supply any vacancies which may be created in their own body by death, resignation, removal, or disability; and also to make orders, ordinances, and laws for the government of the college, the same not being repugnant to the laws of Great Britain or of New Hampshire, and not excluding any person on account of his speculative sentiments in religion, or his being of a religious profession different from that of the trustees.

Eleazer Wheelock the founder of the college.

This charter was accepted, and the property both real and personal, which had been contributed for the benefit of the college, was conveyed to and vested in the corporate body.

From this brief review of the most essential parts of the charter it is apparent that the funds of the college consisted entirely of private donations. It is, perhaps, not very important who were the donors. The probability is that the Earl of Dartmouth, and the other trustees in England, were in fact the largest contributors. Yet the legal conclusion from the facts recited in the charter would probably be that Dr. Wheelock was the founder of the college.

Funds of college consisted of private donations.

The origin of the institution was undoubtedly the In-

dian charity school established by Dr. Wheelock at his own expense. It was at his instance, and to enlarge this school, that contributions were solicited in England. The person soliciting these contributions was his agent; and the trustees who received the money were appointed by, and act under, his authority. It is not too much to say that the funds were obtained by him in trust, to be applied by him to the purposes of his enlarged school. The charter of incorporation was granted at his instance. The persons named by him in his last will, as the trustees of his charity school, compose a part of the corporation. And he is declared to be the founder of the college, and its president for life. Were the inquiry material, we should feel some hesitation in saying that Dr. Wheelock was not in law to be considered as the founder¹ of this institution, and as possessing all the rights appertaining to that character. But be this as it may, Dartmouth College is really endowed by private individuals, who have bestowed their funds for the propagation of the Christian religion among the Indians, and for the promotion of piety and learning generally. From these funds the salaries of the tutors are drawn; and these salaries lessen the expense of education to the students. It is, then, an eleemosynary,² and, as far as respects its funds, a private corporation.

Salaries of tutors drawn from funds donated by private individuals.

Do its objects stamp on it a different character? Are the trustees and professors public officers, invested with any portion of political power, partaking in any degree in the administration of civil government, and performing duties which flow from the sovereign authority?

That education is an object of national concern and a

¹ 1 Bl. Com. 481.

² Ibid. 471.

proper subject of legislation, all admit. That there may be an institution founded by government, and placed entirely under its immediate control, the officers of which would be public officers, amenable exclusively to government, none will deny. But is Dartmouth College such an institution? Is education altogether in the hands of government? Does every teacher of youth become a public officer, and do donations for the purpose of education necessarily become public property, so far that the will of the Legislature, not the will of the donor, becomes the law of the donation? These questions are of serious moment to society, and deserve to be well considered.

Dr. Wheelock, as the keeper of his charity school, instructing the Indians in the art of reading and in our holy religion, sustaining them at his own expense and on the voluntary contributions of the charitable, could scarcely be considered as a public officer, exercising any portion of those duties which belong to government; nor could the Legislature have supposed that his private funds, or those given by others, were subject to legislative management, because they were applied to the purposes of education. When, afterwards, his school was enlarged, and the liberal contributions made in England and in America enabled him to extend his cares to the education of the youth of his own country, no change was wrought in his own character, or in the nature of his duties. Had he employed assistant tutors with the funds contributed by others, or had the trustees in England established a school with Dr. Wheelock at its head, and paid salaries to him and his assistants, they would still have been private tutors; and the fact that they

Enlargement of school wrought no change in Wheelock's character or the nature of his duties.

were employed in the education of youth could not have converted them into public officers, concerned in the administration of public duties, or have given the Legislature a right to interfere in the management of the fund. The trustees, in whose care that fund was placed by the contributors, would have been permitted to execute their trust uncontrolled by legislative authority.

Whence, then, can be derived the idea that Dartmouth College has become a public institution, and its trustees public officers, exercising powers conferred by the public for public objects? Not from the source whence its funds were drawn; for its foundation is purely private and eleemosynary. Not from the application of those funds; for money may be given for education, and the persons receiving it do not, by being employed in the education of youth, become members of the civil government. Is it from the act of incorporation? Let this subject be considered.

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence. These are such as are supposed best calculated to effect the object for which it was created. Among the most important are immortality, and, if the expression may be allowed, individuality; properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs, and to hold property without the perplexing intricacies, the hazardous and endless necessity, of perpetual conveyances for the purpose of transmitting it from hand

Corporation defined.

to hand. It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such power or character on a natural person. It is no more a State instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country? Is it because its existence, its capacities, its powers, are given by law? Because the government has given it the power to take and to hold property in a particular form, and for particular purposes, has the government a consequent right substantially to change that form, or to vary the purposes to which the property is to be applied? This principle has never been asserted or recognized, and is supported by no authority. Can it derive aid from reason?

The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration

Objects for which corporations are created.

of the grant. In most eleemosynary institutions the object would be difficult, perhaps unattainable, without the aid of a charter of incorporation. Charitable or public spirited individuals, desirous of making permanent appropriations for charitable or other useful purposes, find it impossible to effect their design securely and certainly without an incorporating act. They apply to the government, state their beneficent object, and offer to advance the money necessary for its accomplishment, provided the government will confer on the instrument which is to execute their designs the capacity to execute them. The proposition is considered and approved. The benefit to the public is considered as an ample compensation for the faculty it confers, and the corporation is created. If the advantages to the public constitute a full compensation for the faculty it gives, there can be no reason for exacting a further compensation, by claiming a right to exercise over this artificial being a power which changes its nature, and touches the fund for the security and application of which it was created. There can be no reason for implying in a charter, given for a valuable consideration, a power which is not only not expressed, but is in direct contradiction to its express stipulations.

From the fact, then, that a charter of incorporation has been granted, nothing can be inferred which changes the character of the institution, or transfers to the government any new power over it. The character of civil institutions does not grow out of their incorporation, but out of the manner in which they are formed, and the objects for which they are created. The right to change them is not founded on their being incorporated, but on their being the instruments of government,

Character of civil institutions is determined by the manner in which they are formed and the objects for which they are created.

created for its purposes. The same institutions, created for the same objects, though not incorporated, would be public institutions, and, of course, be controllable by the Legislature. The incorporating act neither gives nor prevents this control. Neither in reason can the incorporating act change the character of a private eleemosynary institution.

We are next led to the inquiry, for whose benefit the property given to Dartmouth College was secured? The counsel for the defendant have insisted that the beneficial interest is in the people of New Hampshire. The charter, after reciting the preliminary measures which had been taken, and the application for an act of incorporation, proceeds thus: "Know ye, therefore, that we, considering the premises, and being willing to encourage the laudable and charitable design of spreading Christian knowledge among the savages of our American wilderness, and also, that the best means of education be established in our province of New Hampshire, for the benefit of said province, do, of our special grace," etc. Do these expressions bestow on New Hampshire any exclusive right to the property of the college, any exclusive interest in the labors of the professors? Or do they merely indicate a willingness that New Hampshire should enjoy those advantages which result to all from the establishment of a seminary of learning in the neighborhood? On this point we think it impossible to entertain a serious doubt. The words themselves, unexplained by the context, indicate that the *benefit intended for the province* is that which is derived from "establishing the best means of education therein;" that is, from establish-

For whose benefit the property given to the college was secured?

ing in the province Dartmouth College, as constituted by the charter. But if these words considered alone could admit of doubt, that doubt is completely removed by an inspection of the entire instrument.

The particular interests of New Hampshire never entered into the mind of the donors, never constituted a motive for their donation. The propagation of the Christian religion among the savages, and the dissemination of useful knowledge among the youth of the country, were the avowed and the sole objects of their contributions. In these New Hampshire would participate; but nothing particular or exclusive was intended for her. Even the site of the college was selected, not for the sake of New Hampshire, but because it was "most subservient to the great ends in view," and because liberal donations of land were offered by the proprietors, on condition that the institution should be there established. The real advantages from the location of the college are, perhaps, not less considerable to those on the west than to those on the east side of Connecticut river. The clause which constitutes the incorporation, and expresses the objects for which it was made, declares those objects to be the instruction of the Indians, "and also of English youth, and any others." So that the objects of the contributors, and the incorporating act, were the same: the promotion of Christianity, and of education generally, not the interests of New Hampshire particularly.

From this review of the charter it appears that Dartmouth College is an eleemosynary institution, incorporated for the purpose of perpetuating the application of the bounty of the donors to the specified objects of that bounty; that its trustees or governors were originally

Dartmouth College an
eleemosynary institution.

named by the founder, and invested with the power of perpetuating themselves; that they are not public officers, nor is it a civil institution, participating in the administration of government; but a charity school, or a seminary of education, incorporated for the preservation of its property, and the perpetual application of that property to the objects of its creation.

Yet a question remains to be considered, of more real difficulty, on which more doubt has been entertained than on all that have been discussed. The founders of the college, at least those whose contributions were in money, have parted with the property bestowed upon it, and their representatives have no interest in that property. The donors of land are equally without interest, so long as the corporation shall exist. Could they be found, they are unaffected by any alteration in its constitution, and probably regardless of its form, or even of its existence. The students are fluctuating, and no individual among our youth has a vested interest in the institution which can be asserted in a court of justice. Neither the founders of the college, nor the youth for whose benefit it was founded, complain of the alteration made in its charter, or think themselves injured by it. The trustees alone complain, and the trustees have no beneficial interest to be protected. Can this be such a contract as the Constitution intended to withdraw from the power of State legislation? Contracts, the parties to which have a vested beneficial interest, and those only, it has been said, are the objects about which the Constitution is solicitous, and to which its protection is extended.

Can this be a contract such as the Constitution intended to withdraw from the power of State legislation?

The court has bestowed on this argument the most deliberate consideration, and the result will be stated. Dr. Wheelock, acting for himself, and for those who, at his solicitation, had made contributions to his school, applied for this charter, as the instrument which should enable him and them to perpetuate their beneficent intention. It was granted. An artificial, immortal being was created by the Crown, capable of receiving and distributing forever, according to the will of the donors, the donations which should be made to it. On this being the contributions which had been collected were immediately bestowed. These gifts were made, not, indeed, to make a profit for the donors, or their posterity, but for something in their opinion of inestimable value; for something which they deemed a full equivalent for the money with which it was purchased. The consideration for which they stipulated is the perpetual application of the fund to its object, in the mode prescribed by themselves. Their descendants may take no interest in the preservation of this consideration. But in this respect their descendants are not their representatives. They are represented by the corporation. The corporation is the assignee of their rights, stands in their place, and distributes their bounty, as they would themselves have distributed it, had they been immortal. So with respect to the students who are to derive learning from this source. The corporation is a trustee for them also. Their potential rights, which, taken distributively, are imperceptible, amount collectively to a most important interest. These are, in the aggregate, to be exercised, asserted, and protected by the corporation. They were as completely out of the donors, at the instant of their being vested in the corporation,

Result of court's consideration of the nature of this contract.

and as incapable of being asserted by the students, as at present.

According to the theory of the British Constitution, their parliament is omnipotent. To annul corporate rights might give a shock to public opinion, which that government has chosen to avoid; but its power is not questioned. Had parliament, immediately after the emanation of this charter, and the execution of those conveyances which followed it, annulled the instrument, so that the living donors would have witnessed the disappointment of their hopes, the perfidy of the transaction would have been universally acknowledged. Yet then, as now, the donors would have had no interest in the property; then, as now, those who might be students would have had no rights to be violated; then, as now, it might be said that the trustees, in whom the rights of all were combined, possessed no private

individual, beneficial interest in the property confided to their protection.

The contractual elements, obligations and rights the same as in 1769.

Yet the contract would at that time have been deemed sacred by all. What has since occurred to strip it of its inviolability? Circumstances have not changed it. In reason, in justice, and in law, it is now what it was in 1769.

This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds), were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition

of property. It is a contract on the faith of which real and personal estate

A contract within the letter of the Constitution.

has been conveyed to the corporation. It is, then, a contract within the letter of the Constitution, and within its

spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception, taking this case out of the prohibition contained in the Constitution.

It is more than possible that the preservation of rights of this description was not particularly in the view of the framers of the Constitution when the clause under consideration was introduced into that instrument. It is probable that interferences of more frequent recurrence, to which the temptation was stronger, and of which the mischief was more extensive, constituted the great motive for imposing this restriction on the State Legislatures. But although a particular and a rare case may not in itself be of sufficient magnitude to induce a rule, yet it must be governed by the rule when established, unless some plain and strong reason for excluding it can be given. It is not enough to say that this particular case was not in the mind of the convention when the article was framed, nor of the American people when it was adopted. It is necessary to go farther and to say that had this particular case been suggested, the language would have been so varied as to exclude it, or it would have been made a special exception. The case, being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd, or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception.

On what safe and intelligible ground can this exception stand? There is no expression in the Constitution,

no sentiment delivered by its contemporaneous expounders, which would justify us in making it. In the absence of all authority Construction of the Constitution. of this kind, is there, in the nature and reason of the case itself, that which would sustain a construction of the Constitution not warranted by its words? Are contracts of this description of a character to excite so little interest that we must exclude them from the provisions of the Constitution, as being unworthy of the attention of those who framed the instrument? Or does public policy so imperiously demand their remaining exposed to legislative alteration as to compel us, or rather permit us, to say that these words, which were introduced to give stability to contracts, and which in their plain import comprehend this contract, must yet be so construed as to exclude it?

Almost all eleemosynary corporations, those which are created for the promotion of religion, of charity, or of education, are of the same character. All eleemosynary corporations are of the same general character. The law of this case is the law of all. In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them. Religion, charity, and education are, in the law of England, legatees or donees, capable of receiving bequests or donations in this form. They appear in court, and claim or defend, by the corporation. Are they of so little estimation in the United States that con-

tracts for their benefit must be excluded from the protection of words which in their natural import include them? Or do such contracts so necessarily require new-modeling by the authority of the Legislature that the ordinary rules of construction must be disregarded in order to leave them exposed to legislative alteration?

All feel that these objects are not deemed unimportant in the United States. The interest which this case has excited proves that they are not. The framers of the Constitution did not deem them unworthy of its care and protection. They have, though in a different mode, manifested their respect for science, by reserving to the government of the Union the power "to promote the progress of science and useful arts, by securing, for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries." They have so far withdrawn science and the useful arts from the action of the State Governments. Why, then, should they be supposed so regardless of contracts made for the advancement of literature, as to intend to exclude them from provisions made for the security of ordinary contracts between man and man? No reason for making this supposition is perceived.

If the insignificance of the object does not require that we should exclude contracts respecting it from the protection of the Constitution, neither, as we conceive, is the policy of leaving them subject to legislative alteration so apparent as to require a forced construction of that instrument in order to effect it. These eleemosynary institutions do not fill the place which would otherwise be occupied by government, but that which would other-

Widespread interest in this case.

Beneficent influence of eleemosynary corporations.

wise remain vacant. They are complete acquisitions to literature. They are donations to education; donations which any government must be disposed rather to encourage than to discountenance. It requires no very critical examination of the human mind to enable us to determine that one great inducement to these gifts is the conviction felt by the giver that the disposition he makes of them is immutable. It is probable that no man ever was, and that no man ever will be, the founder of a college, believing at the time that an act of incorporation constitutes no security for the institution; believing that it is immediately to be deemed a public institution, whose funds are to be governed and applied, not by the will of the donor, but by the will of the Legislature. All such gifts are made in the pleasing, perhaps delusive, hope that the charity will flow forever in the channel which the givers have marked out for it. If every man finds in his own bosom strong evidence of the universality of this sentiment, there can be but little reason to imagine that the framers of our Constitution were strangers to it, and that, feeling the necessity and policy of giving permanence and security to contracts, of withdrawing them from the influence of legislative bodies, whose fluctuating policy, and repeated interferences, produced the most perplexing and injurious embarrassments, they still deemed it necessary to leave these contracts subject to those interferences. The motives for such an exception must be very powerful, to justify the construction which makes it.

The motives suggested at the bar grow out of the original appointment of the trustees, which is supposed to have been in a spirit hostile to the genius of our government, and the presumption that, if allowed to continue

themselves, they now are, and must remain forever, what they originally were. Hence is inferred the necessity of applying to this corporation, and to other similar corporations, the correcting and improving hand of the Legislature.

It has been urged repeatedly, and certainly with a degree of earnestness which attracted attention, that the trustees, deriving their power from a regal source, must necessarily partake of the spirit of their origin; and that their first principles, unimproved by that resplendent light which has been shed around them, must continue to govern the college, and to guide the students. Before we inquire into the influence which this argument ought to have on the constitutional question, it may not be amiss to examine the fact on which it rests. The first trustees were undoubtedly named in the charter by the Crown; but at whose suggestion were they named? By whom were they selected? The charter informs us. Dr. Wheelock had represented "that, for many weighty reasons, it would be expedient that the gentlemen whom he had already nominated in his last will to be trustees in America should be of the corporation now proposed." When, afterwards, the trustees are named in the charter, can it be doubted that the persons mentioned by Dr. Wheelock in his will were appointed? Some were probably added by the Crown, with the approbation of Dr. Wheelock. Among these is the Doctor himself. If any others were appointed at the instance of the Crown, they are the Governor, three members of the Council and the Speaker of the House of Representatives of the Colony of New Hampshire. The stations filled by these persons ought to rescue them from any other imputation than too great a dependence on the Crown. If in the

revolution that followed they acted under the influence of this sentiment, they must have ceased to be trustees; if they took part with their countrymen, the imputation which suspicion might excite would no longer attach to them. The original trustees, then, or most of them, were named by Dr. Most of original trustees named by Dr. Wheelock. Wheelock, and those who were added to his nomination, most probably with his approbation, were among the most eminent and respectable individuals in New Hampshire.

The only evidence which we possess of the character of Dr. Wheelock is furnished by this charter. The judicious means employed for the accomplishment of his object, and the success which attended his endeavors, would lead to the opinion that he united a sound understanding to that humanity and benevolence which suggested his undertaking. It surely cannot be assumed that his trustees were selected without judgment. With as little probability can it be assumed that, while the light of science and of liberal principles pervades the whole community, these originally benighted trustees remain in utter darkness, incapable of participating in the general improvement; that, while the human race is rapidly advancing, they are stationary. Reasoning *a priori*, we should believe that learned and intelligent men, selected by its patrons for the government of a literary institution, would select learned and intelligent men for their successors; men as well fitted for the government of a college as those who might be chosen by other means. Should this reasoning ever prove erroneous in a particular case, public opinion, as has been stated at the bar, would correct the institution. The mere possibility of the contrary would not justify a con-

struction of the Constitution which should exclude these contracts from the protection of a provision whose terms comprehend them.

The opinion of the court, after mature deliberation, is that this is a contract, the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.

This is a contract the obligation of which cannot be impaired.

2. We next proceed to the inquiry, whether its obligation has been impaired by those acts of the Legislature of New Hampshire to which the special verdict refers.

Inquiry as to validity of Acts of New Hampshire.

From the review of this charter which has been taken, it appears that the whole power of governing the college, of appointing and removing tutors, of fixing their salaries, of directing the course of study to be pursued by the students, and of filling up vacancies created in their own body, was vested in the trustees. On the part of the Crown it was expressly stipulated that this corporation, thus constituted, should continue forever; and that the number of trustees should forever consist of twelve, and no more. By this contract the Crown was bound, and could have made no violent alteration in its essential terms without impairing its obligation.

By the revolution, the duties, as well as the powers, of government devolved on the people of New Hampshire. It is admitted that among the latter was comprehended the transcendent power of parliament, as well as that of the executive department. It is too clear to require the support of argument, that all contracts and rights respect-

ing property remained unchanged by the revolution. The obligations, then, which were created by the charter to Dartmouth College, were the same in the new that they had been in the old government. The power of the government was also the same. A repeal of this charter, at any time prior to the adoption of the present Constitution of the United States, would have been an extraordinary and unprecedented act of power, but one which could have been contested only by the restrictions upon the Legislature to be found in the Constitution of the State. But the Constitution of the United States has imposed this additional limitation, that the Legislature of a State shall pass no act "impairing the obligation of contracts."

Obligations created by original charter same under the new government as the old.

It has been already stated that the act "to amend the charter, and enlarge and improve the corporation of Dartmouth College," increases the number of trustees to twenty-one, gives the appointment of the additional members to the Executive of the State, and creates a board of overseers, to consist of twenty-five persons, of whom twenty-one are also appointed by the Executive of New Hampshire, who have power to inspect and control the most important acts of the trustees.

On the effect of this law two opinions cannot be entertained. Between acting directly, and acting through the agency of trustees and overseers, no essential difference is perceived. The whole power of governing the college is transferred from trustees, appointed according to the will of the founder expressed in the charter, to the Executive of New Hampshire. The management and application of the funds of this eleemosynary institution, which are placed by the donors in the hands of trustees

named in the charter, and empowered to perpetuate themselves, are placed by this act under the control of the government of the State. The will of the State is substituted for the will of the donors, in every essential operation of the college. This is not an immaterial change. The founders of the college contracted not merely for the perpetual application of the funds, which they gave, to the objects for which those funds were given; they contracted, also, to secure that application by the constitution of the corporation. They contracted for a system which should, as far as human foresight can provide, retain forever the government of the literary institution they had formed in the hands of persons approved by themselves. This system is totally changed. The charter of 1769 exists no longer. It is re-

Original charter of
1769 no longer exists.

organized; and reorganized in such a manner as to convert a literary institution, moulded according to the will of its founders, and placed under the control of private literary men, into a machine entirely subservient to the will of government. This may be for the advantage of this college in particular, and may be for the advantage of literature in general; but it is not according to the will of the donors, and is subversive of that contract on the faith of which their property was given.

In the view which has been taken of this interesting case, the court has confined itself to the rights possessed by the trustees, as the assignees and representatives of the donors and founders, for the benefit of religion and literature. Yet it is not clear that the trustees ought to be considered as destitute of such beneficial interest in themselves as the law may respect. In addition to their being the legal owners of the property, and to their hav-

ing a freehold right in the powers confided to them, the charter itself countenances the idea that trustees may also be tutors with salaries. The first president was one of the original trustees; and the charter provides that, in case of vacancy in that office, "the senior professor or tutor, *being one of the trustees*, shall exercise the office of president, until the trustees shall make choice of and appoint a president." According to the tenor of the charter; then, the trustees might, without impropriety, appoint a president and other professors from their own body. This is a power not entirely unconnected with an interest. Even if the proposition of the counsel for the defendant were sustained; if it were admitted that those contracts only are protected by the Constitution, a beneficial interest in which is vested in the party who appears in court to assert that interest; yet it is by no means clear that the trustees of Dartmouth College have no beneficial interest in themselves.

How office of president
to be filled.

But the court has deemed it unnecessary to investigate this particular point, being of opinion, on general principles, that, in these private eleemosynary institutions, the body corporate, as possessing the whole legal and equitable interest, and completely representing the donors, for the purpose of executing the trust, has rights which are protected by the Constitution.

It results from this opinion that the acts of the Legislature of New Hampshire, which are stated in the special verdict found in this cause, are repugnant to the Constitution of the United States; and that the judgment on this special verdict ought to have been for the plaintiffs. The judgment of the State court must, therefore, be reversed.

Acts of New Hampshire repugnant to the Constitution.

NOTE.

Mr. Justice Miller's rank as a great constitutional lawyer induces the editors to give at some length his views concerning the Dartmouth College decision.

"It may well be doubted whether any decision ever delivered by any court has had such a pervading operation and influence in controlling legislation as this. The legislation, however, so controlled, has been that of the States of the Union." Miller, *Const. of U. S.* 391.

"But it was in the great case of *Dartmouth College v. Woodward* that the inhibition upon the States to impair by law the obligation of contracts received the most elaborate discussion, and the most efficient and instructive application. . . . It contains one of the most full and elaborate expositions of the constitutional sanctity of contracts to be met with in any of the reports. The decision in that case did more than any other single act proceeding from the authority of the United States to throw an impregnable barrier around all rights and franchises derived from the grant of government; and to give solidity and inviolability to the literary, charitable, religious and commercial institutions of our country." Kent, *Com.*, 12th Ed., I, 415, 418.

"This decision has stood from the day it was made to the present hour as a great bulwark against popular effort through State legislation to evade the payment of just debts, the performance of obligatory contracts, and the general repudiation of the rights of creditors." Miller, *Const. of U. S.* 394.

"The opinion has been of late years much criticised, as including with the class of contracts whose foundation is in the legislative action of the States, many which were not probably intended to be so included by the framers of the Constitution. And it is undoubtedly true that the Supreme Court itself has been compelled of late years to insist in this class of cases upon the existence of an actual contract by the State with the corporation, when relief is sought against subsequent legislation." Miller, *Const. of U. S.* 393. See also, *s. r.*, Prof. James B. Thayer's "*John Marshall*," 92, 93; Von Holst, *Const. Law of U. S.* 234, 235; Prof. Jeremiah Smith in *Marshall Memorial*, I, 154-156.

"The main feature of the case, namely, that a State can make a contract by legislation as well as in any other way, and that in no such case shall a subsequent act of the Legislature interpose any effectual barrier to its enforcement when it is enforceable in the ordinary courts of justice, has remained." Miller, *Const. of U. S.* 393.

"It is an interesting chapter in the legal history of this country to consider how, after this decision was rendered, the States sought to, and did practically, avoid the worst effects of it by putting into all statutes granting corporate privileges and powers the condition that the charter should be subject to amendment, alteration, or repeal, at the pleasure of the Legislature. This, of course, entered into and became a part of the contract, which was not, therefore, violated or impaired by a subsequent statute abolishing or changing the corporation." Miller, *Const. of U. S.* 557, 558. See also, *s. p.*, *Ibid.* 532, 533. See *ante*, pp. 194, 210.

REFERENCES TO DARTMOUTH COLLEGE CASE, IN MARSHALL MEMORIAL

VOL. I.

Hon. Wayne MacVeagh, p. 37; Justice Horace Gray, pp. 70, 93; Hon. Charles Freeman Libby, p. 121; Hon. George B. French, pp. 135, 136; Prof. Jeremiah Smith, pp. 148, 154, *et seq.*; Judge Robert M. Wallace, pp. 176, 177; Frank S. Streeter, Esq., pp. 178, 179; President William J. Tucker, pp. 181, 182, 183; Prof. James Bradley Thayer, pp. 234, 235; Judge Le Baron Colt, p. 304; Hon. John F. Dillon, p. 368 *et seq.*; Hon. W. Bourke Cockran, p. 414; Justice James T. Mitchell, p. 484; Hon. John Bassett Moore, p. 518.

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Hon. William Pinkney Whyte, p. 16; Justice Henry B. Brown, pp. 53, 54, 56, 59; Judge James C. MacRae, pp. 80, 81; Hon. H. Warner Hill, pp. 112, 118, 115; Joseph P. Blair, Esq., p. 156; Colonel Horatio Bisbee, p. 169; Judge Waller C. Caldwell, p. 217; Hampton L. Carson, Esq., p. 261; Hon. John F. Follett, p. 276; Hon. William A. Ketcham,

p. 295; Hon. Henry Cabot Lodge, p. 329; Isaac N. Phillips, Esq., p. 389; Geo. E. MacLean, Esq., p. 440; Hon. Henry Hitchcock, p. 515; Judge Elmer B. Adams, p. 539.

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Chief Justice J. M. Bartholomew, p. 148; Judge Bartlett Tripp, p. 157; Judge J. A. Cooper, p. 190; Horace G. Platt, Esq., p. 232; Judge Cornelius H. Hanford, pp. 250, 251; Charles E. Shepard, Esq., p. 278; Eulogy of Horace Binney, p. 319.

CONSTITUTIONAL POWER OF CONGRESS TO
LEVY DIRECT TAXES THROUGHOUT THE
UNITED STATES.

The decision in the next case — *Loughborough v. Blake* — and particularly that portion of the opinion of Chief Justice Marshall relating to the uniformity clause of the Constitution that “all duties, etc., shall be *uniform throughout the United States*,” came into great prominence in the elaborate discussions of counsel in the *Insular Cases*.¹

It will aid to a more ready comprehension of the following opinion to collate here the different provisions of the Constitution that are construed or commented on by the Chief Justice:

Section 8, Art. I. “The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and General Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States.

“To exercise exclusive Legislation in all cases whatsoever, over such District (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the Government of the United States, and to exercise like authority over all places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts,

¹ *De Lima v. Bidwell*, etc., 182 U. S. 1-391 (1901). See note at end of this case in the present volume.

magazines, Arsenal, dock-Yards, and other needful buildings.

Sec. 9, Art. I. "No Capitation, or other direct tax, shall be laid, unless in proportion to the Census or Enumeration herein before directed to be taken.

Sec. 2, Art. I. "Representative and direct taxes shall be apportioned among the several States, which may be included within this Union, according to their respective numbers."

Congress levied a direct tax. In the apportionment of this tax the Territories and the District of Columbia were included as well as the States. The point was made in *Loughborough v. Blake*, that inasmuch as the Territories and the District of Columbia were not *States*, they could not under the Constitution be made subject to the levy and payment of a direct tax. But this contention was adjudged by the Supreme Court not to be sound, and the validity of the direct tax upon the District of Columbia was sustained on the grounds stated in the opinion of the Chief Justice.

Loughborough v. Blake.

February Term, 1890.

[5 Wheaton's Reports, 817-825.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of *Decisions of the Supreme Court of the United States*.

Congress has authority to impose a direct tax on the District of Columbia in proportion to the census directed to be taken by the Constitution.

The power of Congress to levy and collect taxes, duties, imposts and excises is co-extensive with the territory of the United States.

The power of Congress to exercise exclusive jurisdiction in all cases whatsoever within the District of Columbia includes the power of taxing it.

MARSHALL, Chief Justice. This case presents to the consideration of the court a single question.¹ It is this: Has Congress a right to impose a direct tax on the District of Columbia?

The counsel who maintains the negative has contended that Congress must be considered in two distinct characters. In one character, as legislating for the States; in the other, as a local legislature for the District. In the latter character, it is admitted, the power of levying direct taxes may be exercised; but it is contended, for District purposes only, in like manner as the Legislature of a State may tax the people of a State for State purposes.

Sole question in case: Has Congress a right to impose a direct tax on the District of Columbia?

Without inquiring at present into the soundness of this distinction, its possible influence on the application in this District of the first article of the Constitution, and

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

BROCKHOLST LIVINGSTON,

THOMAS TODD,

GABRIEL DUVAL,

JOSEPH STORY,

} *Associate Justices.*

Mr. Walter Jones appeared for the plaintiff; Attorney-General Wirt for the defendant.

of several of the amendments, may not be altogether unworthy of consideration. It will readily suggest itself to the gentlemen who press this argument, that those articles, which, in general terms, restrain the power of Congress, may be applied to the laws enacted by that body for the District, if it be considered as governing the District in its character as the National Legislature, with less difficulty than if it be considered a mere local Legislature.

But we deem it unnecessary to pursue this investigation, because we think the right of Congress to tax the District does not depend solely on the grant of exclusive legislation.

The eighth section of the first article gives to Congress the "power to lay and collect taxes, duties, imposts, and excises," for the purposes thereafter mentioned. This grant is general, without limitation as to place. It consequently extends to all places over which the government extends. If this could be doubted, the doubt is removed by the subsequent words which modify the grant. These words are, "but all duties, imposts, and excises shall be uniform throughout the United States." It will not be contended that the modification of the power extends to places to which the power itself does not extend. The power, then, to lay and collect duties, imposts, and excises may be exercised, and must be exercised, throughout the United States. Does this term designate the whole, or any particular portion, of the American empire? Certainly this question can admit of but one answer. It is the name given to our great republic, which is composed of States and Territories. The District of Columbia, or the terri-

Wording of the eighth section of article 1.

The grant is general and includes the entire Union.

tory west of the Missouri, is not less within the United States than Maryland or Pennsylvania; and it is not less necessary, on the principles of our Constitution, that uniformity in the imposition of imposts, duties, and excises should be observed in the one than in the other. Since, then, the power to lay and collect taxes, which includes direct taxes, is obviously co-extensive with the power to lay and collect duties, imposts, and excises, and since the latter extends throughout the United States, it follows that the power to impose direct taxes also extends throughout the United States.

Power to lay and collect taxes is co-extensive with power to lay and collect duties, imposts, etc.

The extent of the grant being ascertained, how far is it abridged by any part of the Constitution?

The twentieth [second] section of the first article declares that "representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers."

Apportionment of representatives and direct taxes.

The object of this regulation is, we think, to furnish a standard by which taxes are to be apportioned, not to exempt from their operation any part of our country. Had the intention been to exempt from taxation those who were not represented in Congress, that intention would have been expressed in direct terms. The power having been expressly granted, the exception would have been expressly made. But a limitation can scarcely be said to be insinuated. The words used do not mean that direct taxes shall be imposed on States only which are represented, or shall be apportioned to representatives; but that direct taxation, in its application to States, shall

be apportioned to numbers. Representation is not made the foundation of taxation. If, under the enumeration of a representative for every thirty thousand souls, one State had been found to contain fifty-nine thousand, and another sixty thousand, the first would have been entitled

Clause of Constitution not intended to create any exemption from taxation.

to only one representative, and the last to two. Their taxes, however, would not have been as one to two, but as fifty-nine to sixty. This clause was obviously not intended to create any exemption from taxation, or to make taxation dependent on representation, but to furnish a standard for the apportionment of each on the States.

The fourth paragraph of the ninth section of the same article will next be considered. It is in these words: "No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken."

The census referred to is in that clause of the Constitution which has just been considered, which makes numbers the standard by which both representatives and direct taxes shall be apportioned among the States. The actual enumeration is to be made "within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct."

As the direct and declared object of this census is to furnish a standard by which "representatives and direct taxes may be apportioned among the several States which may be included within this Union," it will be admitted that the omission to extend it to the District or the Territories would not render it defective. The census referred to is admitted to be a census exhibiting the numbers of the respective States. It cannot, however,

be admitted that the argument, which limits the application of the power of direct taxation to the population contained in this census, is a just one. The language of the clause does not imply this restriction. It is not that "no capitation or other direct tax shall be laid, unless on those comprehended within the census, herein before directed to be taken," but "unless in proportion to" that census. Now this proportion may be applied to the District or Territories. If an enumeration be taken of the population in the District and Territories, on the same principles on which the enumeration of the respective States is made, then the information is acquired by which a direct tax may be imposed on the District and Territories "in proportion to the census or enumeration" which the Constitution directs to be taken.

The standard, then, by which direct taxes must be laid, is applicable to this District, and will enable Congress to apportion on it its just and equal share of the burden, with the same accuracy as on the respective States. If the tax be laid in this proportion, it is within the very words of the restriction. It is a tax in proportion to the census or enumeration referred to.

Standard by which direct taxes must be laid applicable to District of Columbia.

But the argument is presented in another form, in which its refutation is more difficult. It is urged against this construction that it would produce the necessity of extending direct taxation to the District and Territories, which would not only be inconvenient, but contrary to the understanding and practice of the whole government. If the power of imposing direct taxes be co-extensive with the United States, then it is contended that the restrictive clause, if applicable to the District and Territories, requires that the tax should be extended to them,

since to omit them would be to violate the rule of proportion.

We think a satisfactory answer to this argument may be drawn from a fair comparative view of the different clauses of the Constitution which have been recited.

That the general grant of power to lay and collect taxes is made in terms which comprehend the District and Territories, as well as the States, is, we think, incontrovertible. The subsequent clauses are intended to regulate the exercise of this power, not to withdraw from it any portion of the community. The words in which those clauses are expressed import this intention. In thus regulating its exercise, a rule is given, in the second section of the first article, for its application to the respective States. That rule declares how direct taxes upon the States shall be imposed. They shall be apportioned upon the several States according to their numbers. If, then, a direct tax be laid at all, it must be laid on every State, conformably to the rule provided in the Constitution. Congress has clearly no power to exempt any State from its due share of the burden. But this regulation is expressly confined to the States, and creates no necessity for extending the tax to the District or Territories. The words of the ninth section do not in terms require that the system of direct taxation, when resorted to, shall be extended to the Territories, as the words of the second section require that it shall be extended to all the States. They therefore may, without violence, be understood to give a rule when the Territories shall be taxed, without imposing the necessity of taxing them. It could scarcely escape the members of the convention that the expense of executing the law in a Terri-

General grant of power to lay and collect taxes comprehends the District of Columbia and the Territories.

tory might exceed the amount of the tax. But be this as it may, the doubt created by the words of the ninth section relates to the obligation to apportion a direct tax on the Territories as well as the States, rather than to the power to do so.

If, then, the language of the Constitution be construed to comprehend the Territories and the District of Columbia as well as the States, that language confers on Congress the power of taxing the District and Territories as well as the States. If the general language of the Constitution should be confined to the States, still the sixteenth paragraph of the eighth section gives to Congress the power of exercising "exclusive legislation in all cases whatsoever within this District."

If language of Constitution includes Territories and District of Columbia, then it may tax them as well as States.

On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion; but it is contended that they must be limited by that great principle which was asserted in our revolution, that representation is inseparable from taxation.

The difference between requiring a continent, with an immense population, to submit to be taxed by a government having no common interest with it, separated from it by a vast ocean, restrained by no principle of apportionment, and associated with it by no common feelings; and permitting the representatives of the American people, under the restrictions of our Constitution, to tax a part of the society, which is either in a state of infancy advancing to manhood, looking forward to complete equality so soon as that state of manhood shall be attained, as is the case with the Territories; or which has voluntarily relinquished the right of representation, and has adopted

Congress has power to lay a direct tax in the District of Columbia.

the whole body of Congress for its legitimate government, as is the case with the District, is too obvious not to present itself to the minds of all. Although in theory it might be more congenial to the spirit of our institutions to admit a representative from the District, it may be doubted whether in fact its interests would be rendered thereby the more secure; and certainly the Constitution does not consider their want of a representative in Congress as exempting it from equal taxation.¹

If it were true that, according to the spirit of our Constitution, the power of taxation must be limited by the right of representation, whence is derived the right to lay and collect duties, imposts, and excises within this district? If the principles of liberty, and of our Constitution, forbid the raising of revenue from those who are not represented, do not these principles forbid the raising it by duties, imposts, and excises, as well as by a direct tax? If the principles of our Revolution give a rule applicable to this case, we cannot have forgotten that neither the Stamp Act nor the duty on tea were direct taxes.

Yet it is admitted that the Constitution not only allows but enjoins the government to extend the ordinary revenue system to this District.

If it be said that the principle of uniformity, established in the Constitution, secures the District from oppression in the imposition of indirect taxes, it is not less true that the principle of apportionment, also established in the Constitution, secures the District from any oppressive exercise of the power to lay and collect direct taxes.

After giving this subject its serious attention, the court is unanimously of opinion that Congress possesses, under the Constitution, the power to lay and collect direct taxes

¹See note at end of this case, *infra*, p. 349.

within the District of Columbia, in proportion to the census directed to be taken by the Constitution, and that there is no error in the judgment of the Circuit Court.

Judgment affirmed.

NOTE.

The "Insular Cases" (*De Lima v. Bidwell*, etc.) are officially reported in 182 U. S. 1-391 (1901). In "The Insular Cases, comprising Records, Briefs, etc., by Albert H. Howe," compiled and published by order of Congress, 1901, *Loughborough v. Blake* is referred to and commented on by counsel at pages 42, 83, 88, 111, 247, 330, 389, 419, 480, 541, 570, 862, 885, 889, 995, 1008, 1055. See also Judson on Taxation, 490-495. This learned author discusses with care the propositions that the taxing power of Congress is co-extensive with the territory of the United States, the question of uniformity of Federal taxation and levy of duties, the application of the uniform clause to the territory acquired by the United States as a result of the war with Spain, and to territorial acquisitions generally, with a statement of the points ruled in the Insular Cases. Concerning *Loughborough v. Blake*, Justice Brown, in his opinion in the Insular Cases, states that the proposition of Chief Justice Marshall, that the taxing power of Congress is co-extensive with the territory of the United States, and included the District of Columbia, is, so far as it relates to the District of Columbia, entirely sound; but that Marshall's views so far as they apply to the Territories were not called for by the exigencies of the case (182 U. S. 162). But see on this point (*contra*) the opinion of Justice White, *Id.*, p. 292, and dissenting opinion of Fuller, C. J., *Id.*, 252. See also Address on the Insular Cases of Mr. Littlefield of the Bar of the State of Maine before the American Bar Association, page 242 of the report of 1901.

Forcible resistance to the collection of direct taxes when treasonable, see *United States v. Burr*, *ante*, pp. 103, 104, 105, where the opinions of Justices Iredell, Paterson and Chase at the Circuit are stated and reviewed by Chief Justice Marshall; and see also *United States v. Vigol*, 2

Dallas, 346; *United States v. Mitchell*, 2 Dallas, 348; Impeachment Trial of Justice Chase (Evans' Report), pp. 42-48 of the appendix to said volume.

The case of the *American Insurance Company v. Canter*, 1 Peters, 511, 1828 (which will be found also in the present volume, *infra*), reasserted the proposition that whether the power of Congress to govern Territories is derived from the right of the United States to acquire territory or from the clause in the Constitution that authorizes Congress to make all needful rules and regulations concerning the territory and other property of the United States, the existence of the power was unquestioned.

"A question has arisen and has been decided that 'direct taxes' as used in the Constitution, though in terms to be apportioned among the several States according to their respective numbers and with the negative provision that no 'capitation, or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken,' may still be laid constitutionally upon the people of the District of Columbia, and upon the people of the Territories of the Union, according to the apportionment referred to. The language, though in terms confined to the States, is taken in connection with the general terms of the power to 'lay and collect taxes,' etc., as embracing the District of Columbia and Territories within the power of taxation, so as that direct taxes should be apportioned to them according to their numbers, and all other forms of taxation, as 'duties, imposts and excises,' should be uniform with those laid elsewhere than in the District and in the Territories." Tucker, *Const. of U. S.*, I, 468, 469.

"The question was of a local nature . . . but there were principles involved in the decision which had an extensive and important relation to the whole United States." Kent, *Com.*, I, 256.

"The Constitution, by giving the power to lay and collect taxes, in general terms, doubtless meant to include all sorts of taxes, whether direct or indirect." Story, *Com. Const.*, II, §§ 946, 947. See also references to this case, *Id.*, §§ 951, 995 *et seq.*

"In an early case the question was raised whether Congress had the power to tax the District of Columbia; and

it was held that the power to levy and collect taxes, duties, imposts and excises was co-extensive with the territory of the United States. But if a public enemy conquers and occupies a portion of the United States, the portion so occupied becomes foreign territory so far as revenue laws are concerned, and the subsequent restoration of the authority of the United States over it does not change the character of past transactions. On the other hand, the conquest and military occupation of foreign territory by the United States leaves it foreign country for revenue purposes." Davis' Note to Miller, Const. of U. S., 263, 264. Thayer, Cases Const. Law, 349, note.

REFERENCES TO LOUGHBOROUGH v. BLAKE, IN MARSHALL MEMORIAL

VOL. II.

Hon. John F. Follett, II, pp. 275, 276; Hon. William A. Ketcham, II, 294; Judge Bartlett Tripp, III, 157.

I may add that in the recent argument of the Porto Rico cases in the Supreme Court, involving constitutional questions of the highest moment, among the decisions cited on either side, the two on which, perhaps, the most stress has been laid are *American Ins. Co. v. Canter* and *Loughborough v. Blake*, both decided by Chief Justice Marshall. *Hon. Henry Hitchcock*, II, 505.

That profound jurist who held, in *Loughborough v. Blake* (5 Wheaton, 817), that the power of Congress to levy and collect taxes, duties, imposts and excises, subject to the proviso that they must be uniform throughout the United States, "extends to all places over which the Government extends;" that the term "United States," as there employed, "is given to our great Republic, which is composed of States and Territories," and that the "District of Columbia or the territory west of the Missouri" (as it was in 1820 when that decision was made) "is not less within the United States than Maryland or Pennsylvania," cannot be fairly quoted or claimed as authority for the contention that the provision of the Constitution requiring all taxes, imposts and duties to be uniform throughout the United States should be so construed as to deprive a Territory subject to the Government of the United States of its protection and benefit. *Judge Elmer B. Adams*, II, 541.

***DATE WHEN CONSTITUTION TOOK EFFECT —
CONTRACT CLAUSE NOT RETROACTIVE.***

The next case — *Owings v. Speed* — fixes authoritatively, for the reasons below given by Chief Justice Marshall, that the Federal Constitution went into effect March 4, 1789, and determines also that the contract-clause of the Constitution does not retroact so as to affect State laws passed prior to that date.

Owings v. Speed and Others.

February Term, 1820.

[5 Wheaton's Reports, 420-424.]

The propositions of constitutional law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

The present Constitution of the United States did not commence its operation until the first Wednesday in March, 1789 [March 4, 1789], and the provision in the Constitution that "no State shall make any law impairing the obligation of contracts" does not extend to a State law enacted before that day, and operating upon rights of property vested before that time.

This case depends chiefly on the validity of an act of the Legislature of Virginia passed in the year 1788, and which was contended to be in violation of article 1, sec-

tion 10, of the Constitution of the United States, which forbids a State to pass any law impairing the obligation of contracts. Chief Justice Marshall, in his opinion on this part of the question, found that the act of the Virginia Legislature could not be in conflict with the Constitution of the United States because the operation of that great instrument did not commence until the first Wednesday in March, 1789, some months after the passage of the said act of Virginia, and consequently could not operate upon it.

In the following opinion of the court¹ we have all the facts relating to the points decided. Only that part of the opinion is given which bears on a constitutional question.

MARSHALL, Chief Justice. This was an ejectment brought by the plaintiff in the Circuit Court of the United States for the District of Kentucky, to recover a lot of ground lying in Bardstown. This town was laid off, in 1780, on a tract of land consisting of one thousand acres, for which, in 1785, a patent was issued by the Commonwealth of Virginia to Bard and Owings. In 1788 the Legislature of Virginia passed an act vesting one hundred acres, part

How the case arose —
The facts.

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

BROCKHOLST LIVINGSTON,

THOMAS TODD,

GABRIEL DUVALL,

JOSEPH STORY,

} *Associate Justices.*

Mr. B. Hardin appeared for the defendants.

No counsel appeared for the plaintiff.

of this tract, in trustees, to be laid off in lots, some of them to be given to settlers and others to be sold for the benefit of the proprietors. The cause depends mainly on the validity of this act. It is contended to be a violation of that part of the Constitution of the United States which forbids a State to pass any law impairing the obligation of contracts.

Much reason is furnished by the record for presuming the consent of the proprietors to this law; but the Circuit Court has decided the question independently of this consent, and that decision is now to be reviewed.

Before we determine on the construction of the Constitution in relation to a question of this description, it is necessary to inquire whether the provisions of that instrument apply to any acts of the State Legislatures which were of the date with that which it is now proposed to consider.

This act was passed in the session of 1788. Did the Constitution of the United States then operate upon it?

In September, 1787, after completing the great work in which they had been engaged, the convention resolved that the Constitution should be laid before the Congress of the United States, to be submitted by that body to conventions of the several States, to be convened by their respective Legislatures; and expressed the opinion that, as soon as it should be ratified by the conventions of nine States, Congress should fix a day on which electors should be appointed by the States, a day on which the electors should assemble to vote for President and Vice-President, "and the time and place for commencing proceedings under this Constitution."

Do the provisions of the Constitution of the United States operate on act of the Legislature of such date as the one in question?

How and when the Constitution of the United States began to operate.

The conventions of nine States having adopted the Constitution, Congress, in September or October, 1788, passed a resolution in conformity with the opinions expressed by the convention, and appointed the first Wednesday in March of the ensuing year as the day, and the then seat of Congress as the place "for commencing proceedings under the Constitution."¹

Both governments could not be understood to exist at the same time. The new government did not commence until the old government expired. It is apparent that the government did not commence on the Constitution being ratified by the ninth State; for these ratifications were to be reported to Congress, whose continuing existence was recognized by the convention, and ^{Idem.} who were requested to continue to exercise their powers for the purpose of bringing the new government into operation. In fact, Congress did continue to act as a government until it dissolved, on the first of November, by the successive disappearance of its members. It existed potentially until the second of March, the day preceding that on which the members of the new Congress were directed to assemble.

The resolution of the convention might originally have suggested a doubt whether the government could be in operation for every purpose before the choice of a President; but this doubt has been long solved, and were it otherwise, its discussion would be useless, since it is apparent that its operation did not commence before the first Wednesday in March, 1789, before which time Virginia had passed the act which is alleged to violate the Constitution.

Judgment affirmed, with costs.

¹ Miller, Const. of the U. S. 91.

NOTE.

As to the contract clause of the Constitution see Dartmouth College Case, *ante*, p. 299, and notes. As to the contract clause in connection with the bankruptcy clause of the Constitution, see *Sturges v. Crowninshield*, *ante*, p. 226 and notes, and *Ogden v. Saunders*, *post*, and notes.

"It may be well to say that a law of Virginia passed prior to March 4, 1789, which impaired a pre-existing contract, was, so far as respects the Federal Constitution, held to be a valid law, because made before the Constitution went into effect. Does the prohibition to the States, to pass any law impairing the obligation of a contract, involve the inference that Congress may pass such laws? Clearly not, except as to the grant of power to Congress to pass uniform bankrupt laws. The State, because of this prohibitory clause, cannot pass a bankrupt law, but Congress under the express grant of power may do so." Tucker, Const. of the U. S., II, 840. See *Sturges v. Crowninshield*, *ante*, p. 226, and notes.

"That the Constitution never went into effect until March 4, 1789, and then only as to the States which had ratified it, is conclusively established." Tucker, Const. of the U. S., I, 269.

CONSTITUTIONAL SUPREMACY OF THE SUPREME COURT OVER JUDGMENTS OF STATE COURTS DENYING FEDERAL RIGHTS.

I.

In the next case herein given — *Cohens v. Virginia*, 1821 — Marshall delivered one of his most powerful, closely reasoned and luminous decisions. It is not easy to assign it a place inferior to the best and most characteristic of his great judicial judgments.¹ It reaffirmed the decision made in 1816 in *Martin v. Hunter's Lessee*,² that under the Constitution and the Judiciary Act the Supreme Court of the United States had the power to re-examine the judgment of a State court when that judgment decided against any right claimed or defense set up under the Constitution, laws and treaties of the United States; and it decided the further point that the appellate jurisdiction of the Supreme Court extended, notwithstanding the Eleventh Amendment, to all such cases, whoever may be the parties, and even if one of the parties is a *State of the Union* and the other a *citizen of the same State*. This decision put a quietus on the question of the revisory power of the Supreme Court over State court judgments denying what has come to be comprehensively styled "a Federal right," and that power is now in constant and undisputed exercise in the Supreme Court with the approval of the entire bar

¹ Marshall Memorial, II, 230 (Shauck); Mr. Carson's Estimate, 256-260; A Beacon Light, 540 (Adams); III, 120, 121 (Rose).

² 1 Wheaton, 304.

and people. The decision in *Cohens' case* was not everywhere immediately acquiesced in, and unsuccessful attempts were shortly afterwards made to amend the Constitution in this respect, and to repeal or restrict the twenty-fifth section of the Judiciary Act.¹

¹ Marshall Memorial, I, 168.

In 1822 Mr. Richard M. Johnson of Kentucky proposed an amendment to the Constitution giving appellate jurisdiction to the *Senate* in any case in which a State was a party arising under the Constitution, laws and treaties of the United States. Under date of January 14, 1822, Mr. Webster writes to Justice Story: "Mr. Johnson, of Kentucky, has to-day, I learn, made a long speech in favor of his proposed amendment. He has dealt, they say, pretty freely with the Supreme Court. Dartmouth College, *Sturges v. Crowninshield*, *et cetera*, have all been demolished. To-morrow he is to pull to pieces the case of the Kentucky betterment law (*Green v. Biddle*). Then Governor Barbour is to annihilate *Cohens v. Virginia*." Webster, "Private Correspondence," I, 320. See Jefferson's Criticism of *Cohens v. Virginia*, "Jefferson's Writings" (Ford), X. pp. 229, 232; Van Santvoord, "Lives of the Chief Justices of the United States," 410 and note.

"This exercise of appellate jurisdiction over the decisions of the State courts, in this class of cases, had given no special dissatisfaction in New Jersey, or Maryland, or New Hampshire, the States in which the most prominent cases of its application had arisen; but when in the cases of *Cohens v. Virginia* and *Green v. Biddle*, coming from Virginia and Kentucky, the same power had been successfully invoked, State jealousy and pride were touched to the quick in two of their principal strongholds. The dissatisfaction culminated at this session of Congress in efforts to curtail the authority and limit the action of the Supreme Court. Mr. Webster's opposition [as Chairman of the House Judiciary Committee] was successful, and this class of cases was left under the provisions of the Judiciary Act of 1789" (sec. 25). Curtis, "Life of Webster," I, 215, 216.

Judge Roane delivered one of the opinions of the Virginia Court of Appeals in 1814, which refused to obey the mandate of the Supreme Court of the United States (4 Munford (Va.) Reports, pp. 25-54), and to him Jefferson writes, March 9, 1821:

"The great object of my fear is the Federal Judiciary. That body,

The 25th section of the Judiciary Act (Act of September 24, 1789) is the section which authorizes the Supreme Court of the United States to re-examine, by way of appeal or writ of error, the decision of a State court when

like gravity, ever acting, with noiseless foot and unalarming advance, gaining ground step by step, and holding what it gains, is ingulfing insidiously the special governments into the jaws of that which feeds them." Writings of Jefferson (Ford), X, 189.

Jefferson writing to Pleasants, December 26, 1821, makes mention of Cohens' Case:

"But you will have a more difficult task in curbing the Judiciary in their enterprises on the Constitution. . . . One remedy, I think, and indeed the best I can devise, would be to give future commissions to judges for six years (the senatorial term) with a re-appointment ability by the President with the approbation of *both Houses*. . . . By this change of tenure a remedy would be held up to the States, which, although very distant, would probably keep them quiet. In aid of this, a more immediate effect would be produced by a joint protestation of both *Houses of Congress*, that the doctrines of the judges in the case of Cohens, adjudging a State amenable to their tribunal, and that Congress can authorize a corporation of the District of Columbia to pass any act which shall have the force of law within a State, are contrary to the provisions of the Constitution of the United States." Writings of Jefferson (Ford), X, 198, 199.

In Jefferson's letter to Judge Johnson, June 12, 1823, referring to the case of Cohens v. Virginia, he says:

"On the decision of the case of Cohens v. The State of Virginia, Judge Roane, under the signature of Algernon Sidney, wrote for the Enquirer a series of papers on the law of that case. I considered these papers maturely as they came out, and confess that they appeared to me to pulverize every word which had been delivered by Judge Marshall, of the extra-judicial part of his opinion; and all was extra-judicial, except the decision that the act of Congress had not purported to give the corporation of Washington the authority claimed by their lottery law, of controlling the laws of the States within the States themselves. But unable to claim that case, he could not let it go entirely, but went on gratuitously to prove that, notwithstanding the eleventh amendment of the Constitution, a

the decision of such court is against some title, right or privilege specially set up and claimed by a party under the Constitution, laws or treaties of the United States. This provision is still in force without substantial change and constitutes section 709 of the present Revised Statutes of the United States.

State *could* be brought as a defendant to the bar of his court; and again, that Congress might authorize a corporation of its territory to exercise legislation within a State, and paramount to the laws of that State. . . . But the Chief Justice says 'there must be an ultimate arbiter somewhere.' True, there must; but does that prove it is either party? The ultimate arbiter is the people of the Union, assembled by their deputies in convention, at the call of Congress, or of two-thirds of the States. Let them decide to which they mean to give an authority claimed by two of their organs. And it has been the peculiar wisdom and felicity of our Constitution to have provided this peaceable appeal, where that of other nations is at once to force. I rejoice in the example you set of *seriatim* opinions." Writings of Jefferson (Ford), X, 229, 232.

Mr. Wirt in 1823, when he was the Attorney-General under Mr. Monroe, magnanimously threw aside party and warmly urged the appointment of Chancellor Kent, though a Federalist, to a seat upon the Supreme Bench. Wirt's action in this matter entitles his name and memory to the respect of every true lawyer and patriotic citizen. From his noble letter to the President we extract the following concerning the Supreme Court, its great functions and the state of public opinion relating to certain of its decisions, including *Cohens v. Virginia*: "The appointment of a Judge of the Supreme Court is a national and not local concern. The great importance of that Court in the administration of the Federal Government begins to be generally understood and acknowledged. The local irritation at some of their decisions in particular quarters (as in Virginia and Kentucky for instance) are greatly overbalanced by the general approbation with which these same decisions have been received throughout the Union. The Constitution is the public property of the United States. It is now seen on every hand that the functions to be performed by the Supreme Court of the United States are among the most difficult and perilous which are to be performed

The salutary effect of the principles laid down in the Hunter and Cohens cases, *i. e.*, the supremacy of Federal rights, the power of the National courts finally to interpret the Constitution and laws of the United States, to protect and enforce Federal rights and powers, although denied by State legislation or State decisions, the effect of these cases in insuring uniformity of decision, in giving force and vigor to the Union, strengthening the bonds of the Constitution, and enabling the General Government to execute its duties and exercise its powers in every State and on every foot of National territory, is obvious to all, and is now no longer seriously controverted.¹

II.

Justice Story's opinion in *Martin v. Hunter's Lessee*,² above mentioned, affirming the existence of a revisory power in the Supreme Court over the judgments of the highest court of sovereign States, was not accepted as conclusive, and was by some State courts, and in certain quarters, earnestly opposed. A brief history of the case last mentioned is here proper as explaining the reason why Marshall considered it necessary in *Cohens v. Virginia* to examine and discuss the whole subject with such fullness of reasoning and illustration. In

under the Constitution, the happiness of the whole nation, and even its peace as concerns other nations." Kennedy, "Life of William Wirt," II, 134.

¹ The opinion in *Cohens v. Virginia* so firmly established the revisory jurisdiction of the Supreme Court over this class of State court decisions "that Mr. Justice Field, in an opinion announced by him in 1880, remarked that the question had passed beyond the region of discussion for more than half a century." Marshall Memorial, II, 557 (Address of Sanford B. Ladd).

² 1 Wheaton, 304.

Hunter's Lessee *v.* Martin the Virginia Court of Appeals decided in favor of the validity of a grant of land made by Virginia in 1789 to Hunter as against the title claimed by the defendant under Lord Fairfax, and under the Treaty of Peace between the United States and Great Britain.¹ The case was clearly within the appellate jurisdiction of the Supreme Court of the United States under the language of section 25 of the Judiciary Act. That court took jurisdiction, heard the case, reversed the judgment of the Court of Appeals of Virginia, and issued its mandate in 1813 to the Virginia court directing it to enter a judgment in favor of Martin, the holder of the Fairfax title. In 1814 the Court of Appeals of Virginia considered the question whether it should obey the mandate of the Supreme Court of the United States, and reached the conclusion that it would decline to obey the mandate.²

¹ Hunter *v.* Fairfax's Devisee, 1 Munford (Va.) Rep. 218-238 (1810); s. c., 4 Munford (Va.) Rep. 1 (1814).

² The case is reported at length in Munford (Va.) Rep., vol. IV, pp. 1-59 (1814). The following is the text of the order of the Court of Appeals of Virginia declining obedience to the mandate of the Supreme Court of the United States:

"The court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this court under a sound construction of the Constitution of the United States; that so much of the 25th section of the Act of Congress to establish the judicial courts of the United States, as extends the appellate jurisdiction of the Supreme Court to this court, is not in pursuance of the Constitution of the United States; that the writ of error in this cause was improvidently allowed under the authority of that act; that the proceedings thereon in the Supreme Court were *coram non jndice*, in relation to this court, and that obedience to its mandate be declined by the court."

Opinions, *seriatim*, of marked ability were delivered by Judges Cabell, Brooke, Roane and Fleming, the other member of the court,

This conclusion destroys the appellate judicial power of the Supreme Court over judgments of the State courts deciding against rights claimed under the Constitution, laws and treaties of the United States; makes each State tribunal the final interpreter of Federal rights; destroys all possibility of uniformity of decision, and strips the Supreme Court of its most useful function, that of peaceably settling the competing claims and pretensions of the State and National Governments.

Marshall justly declared that such questions were of "great magnitude and may be truly said vitally to affect the Union." This solemn refusal of the Virginia Court of Appeals to obey the judgment of the Supreme Court of the United States attracted the serious attention of the country. A second appeal (by writ of error) was taken from this judgment of refusal, which appeal was

from "a peculiar circumstance" not stated, being unable to sit. The substantial ground of this decision of the Virginia court, which at the present day seems so bold and surprising, is the extreme State's rights view of the Constitution then so prevalent in certain sections, viz.: That the Federal and State governments are each sovereign; that each government must act by *its own organs*; that the Federal and State courts, though not foreign, are yet separate, distinct from and independent of each other, and that neither can act *compulsively* upon the other; that if this court should obey the mandate of the Supreme Court it must either act as Federal or State judges; that State judges cannot be made Federal judges without their consent and without commissions; that as State judges we cannot be dictated to by any court except a superior appellate court, and the United States Supreme Court cannot, under the Constitution, be invested with appellate jurisdiction over the State courts, even as respects Federal rights and questions, and consequently the 25th section of the Judiciary Act, which, by its terms, undertakes to confer such jurisdiction on the Supreme Court, is in conflict with the Constitution and void—and for these reasons the court declines to obey the mandate of the Supreme Court.

decided by the Supreme Court in 1816, wherein Mr. Justice Story delivered the opinion of the court,¹ reasserting the revisory appellate power of the Supreme Court over the State court judgments whenever such judgments decided against a right claimed under the Constitution, laws or treaties of the United States.

Any further actual conflict with the Court of Appeals of Virginia was avoided by the Supreme Court itself adjudging and declaring void the judgment of the Virginia Court of Appeals and adjudging and declaring valid the judgment of the lower Virginia court which held in favor of Fairfax-treaty title.²

III.

Mr. Justice Story was appointed a justice of the Supreme Court in 1811 by President Madison. His political affiliations were with the Republicans and not with the Federalists. In 1816 Mr. Justice Story gave the opinion of the Supreme Court in *Martin v. Hunter's Lessee*. Speaking of his father and of this decision, William W. Story makes these interesting observations:³ "This was the first great constitutional judgment delivered by my father. The views of the party to which he belonged were widely different from those entertained by the illustrious Chief Justice Marshall. Upon taking his seat on the Bench my father devoted himself to this branch of the law [Constitutional Law] and the result was a cordial adherence to the views of Marshall, whom he considered then and ever afterwards as the expounder of the true principles of the Constitution. Nor did this indicate so

¹ 1 Wheaton, 304.

² 1 Wheaton, 362.

³ "Life and Letters of Joseph Story," by William W. Story (Little & Brown), 1851, Vol. I, 276.

much a *change* as a *formation* of opinion. As the doctrines in *Martin v. Hunter's Lessee* were at all points opposite to those of Mr. Jefferson and the Republicans, my father was exposed to the accusation of being a renegade of party. This neither troubled nor influenced him."¹

Opinions on great and especially on novel constitutional subjects were then almost uniformly pronounced by the Chief Justice. Why the opinion in *Martin v. Hunter's Lessee* was given by Mr. Justice Story is perhaps not definitely known. Mr. Justice Gray's conjecture is that it was from feelings of delicacy towards the judges of the Court of Appeals of his native State.² Mr. Henry Adams thinks it was a stroke of policy on Marshall's part.³ As neither motive would have been at all discreditable or improper, it is scarcely worth while to pursue an inquiry which is more curious than important.

Cohens v. State of Virginia.

February Term, 1821.

[6 Wheaton's Reports, 264-447.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of *Decisions of the Supreme Court of the United States*:

The twenty-fifth section of the Judiciary Act is a constitutional and valid law. It applies to and includes a case in which a State proceeds in its own court, by

¹ "After 1811 a majority of Marshall's associates on the Bench held their appointment from administrations of the party opposed to that to which he had belonged." *Marshall Memorial*, I, 519 (John Bassett Moore); *Id.*, II, 479, 480 (Frederick W. Lehmann).

² *Marshall Memorial*, I, 68, 69; II, 51 (Justice Brown).

³ *Marshall Memorial*, II, 256 (Address of Hampton L. Carson).

indictment, against one of its citizens who attempts to defend under an act of Congress; and this court, upon the writ of error, will determine whether or no the act of Congress constituted a defense.

The charter of the city of Washington did not authorize the corporation to enforce the sale of lottery tickets in States whose laws prohibited such sales.

P. J. and M. J. Cohens were indicted, under an act of Virginia, for selling lottery tickets; they defended under an act of Congress, but judgment was given against them. An appeal to the higher Virginia courts being refused, because no higher court had jurisdiction of the subject-matter, they sued out a writ of error under the 25th section of the Judiciary Act to the Supreme Court of the United States. The attorney for Virginia moved to dismiss this writ on the ground of want of jurisdiction in the Supreme Court.¹ Upon this motion Chief Justice Marshall delivered the opinion of the court as follows:

MARSHALL, Chief Justice. This is a writ of error to a judgment rendered in the court of hustings for the borough of Norfolk, on an information for selling lottery tickets contrary to an act of the Legisla-

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice*,

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

BROCKHOLST LIVINGSTON,

THOMAS TODD,

GABRIEL DUVAL,

JOSEPH STORY,

} *Associate Justices*

Justice Washington was absent on account of illness during this term. Mr. D. B. Ogden and Mr. William Pinkney appeared for

ture of Virginia. In the State court the defendant claimed the protection of an act of Congress. A case was agreed between the parties, which states the act of assembly on which the prosecution was founded, and the act of Congress on which the defendant

relied, and concludes in these words: Agreed statement of facts.

"If upon this case the court shall be of opinion that the acts of Congress before mentioned were valid, and on the true construction of those acts the lottery tickets sold by the defendants as aforesaid might lawfully be sold within the State of Virginia, notwithstanding the act or statute of the General Assembly of Virginia prohibiting such sale, then judgment to be entered for the defendants. And if the court should be of opinion that the statute or act of the General Assembly of the State of Virginia, prohibiting such sale, is valid, notwithstanding the said acts of Congress, then judgment to be entered that the defendants are guilty, and that the Commonwealth recover against them one hundred dollars and costs."

Judgment was rendered against the defendants, and the court in which it was rendered being the highest court of the State in which the cause was cognizable,

plaintiff in error. Mr. Barbour and Mr. Smyth appeared for defendant in error.

The case of *Cohens v. Virginia* was afterwards argued on the merits and a brief opinion given by the Chief Justice (6 Wheaton, 440) to the effect that the charter of the city of Washington granted by Congress did not authorize the city to force the sale of lottery tickets in States where such sales were prohibited by the laws of such States, and consequently the charter of the city was no defense to an indictment for a violation of the statutes of Virginia. The opinion on the merits is not given, since it related to no constitutional point.

the record has been brought into this court by writ of error.

The defendant in error moves to dismiss this writ for want of jurisdiction.

In support of this motion three points have been made, and argued with the ability which the importance of the question merits. These points are —

Points made by the State on motion to dismiss writ of error.

1st. That a State is a defendant.

2d. That no writ of error lies from this court to a State court.

3d. The third point has been presented in different forms by the gentlemen who have argued it. The counsel who opened the cause said that the want of jurisdiction was shown by the subject-matter of the case. The counsel who followed him said that jurisdiction was not given by the Judiciary Act. The court has bestowed all its attention on the arguments of both gentlemen, and supposes that their tendency is to show that this court has no jurisdiction of the case, or, in other words, has no right to review the judgment of the State court, because neither the Constitution nor any law of the United States has been violated by that judgment.

The questions presented to the court by the two first points made at the bar are of great magnitude, and may be truly said vitally to affect the Union.

Questions presented of great magnitude.

They exclude the inquiry whether the Constitution and laws of the United States have been violated by the judgment which the plaintiffs in error seek to review; and maintain that, admitting such violation, it is not in the power of the government to apply a corrective. They maintain that the Nation does not possess a department capable of restraining peaceably, and by

authority of law, any attempts which may be made by a part against the legitimate powers of the whole; and that the government is reduced to the alternative of submitting to such attempts, or of resisting them by force. They maintain that the Constitution of the United States has provided no tribunal for the final construction of itself, or of the laws or treaties of the Nation; but that this power may be exercised in the last resort by the courts of every State in the Union. That the Constitution, laws, and treaties may receive as many constructions as there are States; and that this is not a mischief, or, if a mischief, is irremediable. These abstract propositions are to be determined; for he who demands decision without permitting inquiry affirms that the decision he asks does not depend on inquiry.

If such be the Constitution, it is the duty of the court to bow with respectful submission to its provisions. If such be not the Constitution, it is equally the duty of this court to say so; and to perform that task which the American people have assigned to the judicial department.

1st. The first question to be considered is, whether the jurisdiction of this court is excluded by the character of the parties, one of them being a State, and the other a citizen of that State.

Jurisdiction of court in suits between a State and its citizens.

The second section of the third article of the Constitution defines the extent of the judicial power of the United States. Jurisdiction is given to the courts of the Union in two classes of cases. In the first, their jurisdiction depends on the character of the cause, whoever may be the parties. This class comprehends "all cases.

Extent of judicial power of the United States defined in the Constitution.

in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority." This clause ex-

tends the jurisdiction of the court to all the cases described, without making in its terms any exception whatever, and without any regard to the condition of the party. If there be any exception, it is to be implied against the express words of the article.

Where jurisdiction depends on character of the cause.

In the second class the jurisdiction depends entirely on the character of the parties. In this are comprehended "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign States, citizens, or subjects." If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.¹

Where jurisdiction depends on character of the parties.

¹ The reader should remember in reading the present opinion of Chief Justice Marshall, that, as we have seen (*ante*, pp. 362-363, note), the Court of Appeals of Virginia, in the case of *Hunter v. Fairfax's Devisee*, 4 Mumford, Virginia Rep. 1 (1814), refused obedience to the mandate of the Supreme Court of the United States on the express ground that although the twenty-fifth section of the Judiciary Act of Congress expressly extended the appellate jurisdiction of the Supreme Court of the United States to the State courts where the State courts denied any constitutional or Federal right, yet that in the opinion of the Court of Appeals of Virginia this provision of the Judiciary Act was void because the Constitution of the United States, by its true construction, did not extend the appellate power of the courts of the Union over the judgments of the State courts in any case whatsoever.

The counsel for the defendant in error have stated that the cases which arise under the Constitution must grow out of those provisions which are capable of self-execution; examples of which are to be found in the second section of the fourth article, and in the tenth section of the first article.

A case which arises under a law of the United States must, we are likewise told, be a right given by some act which becomes necessary to execute the powers given in the Constitution, of which the law of naturalization is mentioned as an example.

The use intended to be made of this exposition of the first part of the section, defining the extent of the judicial power, is not clearly understood. If the intention be merely to distinguish cases arising under the Constitution from those arising under a law, for the sake of precision in the application of this argument, these propositions will not be controverted. If it be to maintain that a case, arising under the Constitution or a law, must be one in which a party comes into court to demand something conferred on him by the Constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the Constitution in the twenty-fifth section of the Judiciary Act; and we perceive no reason to depart from that construction.

A case in law or equity arises under the Constitution or a law of the United States when its correct decision depends on the construction of either.

The jurisdiction of the court, then, being extended by

the letter of the Constitution to all cases arising under it, or under the laws of the United States, it follows that those who would withdraw any case of this description from that jurisdiction must sustain the exemption they claim on the spirit and true meaning of the Constitution, which spirit and true meaning must be so apparent as to overrule the words which its framers have employed.

The counsel for the defendant in error have undertaken to do this; and have laid down the general proposition, that a sovereign, independent State is not suable except by its own consent.

This general proposition will not be controverted. But its consent is not requisite in each particular case. It may be given in a general law. And if a State has surrendered any portion of its sovereignty, the question, whether a liability to suit be a part of this portion, depends on the instrument by which the surrender is made. If, upon a just construction of that instrument it shall appear that the State has submitted to be sued, then it has parted with this sovereign right of judging in every case on the justice of its own pretensions, and has intrusted that power to a tribunal in whose impartiality it confides.

Consent of a State to be sued may be given in a general law.

The American States, as well as the American people, have believed a close and firm union to be essential to their liberty and to their happiness. They have been taught by experience that this union cannot exist without a government for the whole; and they have been taught by the same experience that this government would be a mere shadow, that must disappoint all their hopes, unless invested with large portions of that sovereignty which be-

A close and firm union of the States essential to the liberty and happiness of the people.

longs to independent States. Under the influence of this opinion, and thus instructed by experience, the American people, in the convention of their respective States, adopted the present Constitution.

If it could be doubted whether from its nature it were not supreme in all cases where it is empowered to act, that doubt would be removed by the declaration that

The Constitution, etc., the supreme law of the land.

“this Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby; anything in the Constitution or laws of any State to the contrary notwithstanding.”

This is the authoritative language of the American people; and, if gentlemen please, of the American States. It marks, with lines too strong to be mistaken, the characteristic distinction between the Government of the Union and those of the States. The General Government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the Constitution; and if there be any who deny its necessity, none can deny its authority.

Characteristic distinction between the Government of the Union and those of the States.

To this supreme government ample powers are confided; and if it were possible to doubt the great purposes for which they were so confided, the people of the United States have declared that they are given “in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty to themselves and their posterity.”

With the ample powers confided to this supreme government for these interesting purposes are connected many express and important limitations on the sovereignty of the States, which are made for the same purposes. The powers of the Union on the great subjects of war, peace and commerce, and on many others, are in themselves limitations of the sovereignty of the States; but in addition to these, the sovereignty of the States is surrendered in many instances where the surrender can only operate to the benefit of the people, and where, perhaps, no other power is conferred on Congress than a conservative power to maintain the principles established in the Constitution. The maintenance of these principles in their purity is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases of every description arising under the Constitution or laws of the United States. From this general grant of jurisdiction no exception is made of those cases in which a State may be a party. When we consider the situation of the government of the Union and of a State in relation to each other, the nature of our Constitution, the subordination of the State governments to that Constitution, the great purpose for which jurisdiction over all cases arising under the Constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant an exception of those cases in which a State may be a party? Will the spirit of the Constitution justify this attempt to control its words? We think it will not. We think a case

Limitations on the sovereignty of the States.

A case arising under the Constitution and laws of the United States is cognizable in the courts of the Union whoever may be the parties.

arising under the Constitution or laws of the United States is cognizable in the courts of the Union, whoever may be the parties to that case.

Had any doubt existed with respect to the just construction of this part of the section, that doubt would have been removed by the enumeration of those cases to which the jurisdiction of the Federal courts is extended in consequence of the character of the parties. In that enumeration we find "controversies between two or more States, between a State and citizens of another State," "and between a State and foreign States, citizens, or subjects."

One of the express objects, then, for which the judicial department was established is the decision of controversies between States and between a State and individuals. The mere circumstance that a State is a party gives jurisdiction to the court. How, then, can it be contended

Mere circumstance that a State is a party gives jurisdiction to the court.

that the very same instrument, in the very same section, should be so construed as that this same circumstance should withdraw a case from the jurisdiction of the court, where the Constitution or laws of the United States are supposed to have been violated? The Constitution gave to every person having a claim upon a State a right to submit his case to the court of the Nation. However unimportant his claim might be, however little the community might be interested in its decision, the framers of our Constitution thought it necessary, for the purposes of justice, to provide a tribunal as superior to influence as possible, in which that claim might be decided. Can it be imagined that the same persons considered a case involving the Constitution of our country and the majesty of the laws, questions in which every American citizen

must be deeply interested, as withdrawn from this tribunal because a State is a party?

While weighing arguments drawn from the nature of government, and from the general spirit of an instrument, and urged for the purpose of narrowing the con-

The judicial power of government must be co-extensive with the legislative.

struction which the words of that instrument seem to require, it is proper to place in the opposite scale those principles, drawn from the same sources, which go to sustain the words in their full operation and natural import. One of these, which has been pressed with great force by the counsel for plaintiffs in error, is that the judicial power of every well-constituted government must be co-extensive with the legislative, and must be capable of deciding every judicial question which grows out of the Constitution and laws.

If any proposition may be considered as a political axiom, this, we think, may be so considered. In reasoning upon it as an abstract question, there would, probably, exist no contrariety of opinion respecting it. Every argument, proving the necessity of the department, proves also the propriety of giving this extent to it. We do not mean to say that the jurisdiction of the courts of the Union should be construed to be co-extensive with the legislative merely because it is fit that it should be so; but we mean to say that this fitness furnishes an argument in construing the Constitution which ought never to be overlooked, and which is most especially entitled to consideration when we are inquiring whether the words of the instrument which purport to establish this principle shall be contracted for the purpose of destroying it.

The mischievous consequences of the construction contended for on the part of Virginia are also entitled to

great consideration. It would prostrate, it has been said, the government and its laws at the feet of every State in the Union. And would not this be its effect? What power of the government could be executed by its own means in any State disposed to resist its execution by a course of legislation? The laws must be executed by individuals acting within the several States. If these individuals may be exposed to penalties, and if the courts of the Union cannot correct the judgments by which these penalties may be enforced, the course of the government may be, at any time, arrested by the will of one of its members. Each member will possess a *veto* on the will of the whole.

Supreme power of the courts of the United States in the execution of their laws essential to the welfare of the Union.

The answer which has been given to this argument does not deny its truth, but insists that confidence is reposed, and may be safely reposed, in the State institutions; and that, if they shall ever become so insane or so wicked as to seek the destruction of the government, they may accomplish their object by refusing to perform the functions assigned to them.

We readily concur with the counsel for the defendant in the declaration that the cases which have been put of direct legislative resistance for the purpose of opposing the acknowledged powers of the government are extreme cases, and in the hope that they will never occur; but we cannot help believing that a general conviction of the total incapacity of the government to protect itself and its laws in such cases would contribute in no inconsiderable degree to their occurrence.

Let it be admitted that the cases which have been put are extreme and improbable, yet there are gradations of opposition to the laws, far short of those cases, which

might have a baneful influence on the affairs of the nation. Different States may entertain different opinions on the true construction of the constitutional powers of Congress. We know that at one time the assumption of the debts contracted by the several States during the war of our revolution was deemed unconstitutional by some of them. We know, too, that at other times certain taxes imposed by Congress have been pronounced unconstitutional. Other laws have been questioned partially, while they were supported by the great majority of the American people. We have no assurance that we shall be less divided than we have been. States may legislate in conformity to their opinions, and may enforce those opinions by penalties. It would be hazardous too much to assert that the judicatures of the States will be exempt from the prejudices by which the Legislatures and people are influenced, and will constitute perfectly impartial tribunals. In many States the judges are dependent for office and for salary on the will of the Legislature. The Constitution of the United States furnishes no security against the universal adoption of this principle. When we observe the importance which that Constitution attaches to the independence of judges, we are the less inclined to suppose that it can have intended to leave these constitutional questions to tribunals where this independence may not exist, in all cases where a State shall prosecute an individual who claims the protection of an act of Congress. These prosecutions may take place even without a legislative act. A person making a seizure under an act of Congress may be indicted as a trespasser, if force has been employed, and of this a jury may judge. How extensive may be the mischief, if the first decisions in such cases should be final !

These collisions may take place in times of no extraordinary commotion. But a Constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course cannot always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, as far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day. Courts of justice are the means most usually employed; and it is reasonable to expect that a government should repose on its own courts, rather than on others. There is certainly nothing in the circumstances under which our Constitution was formed, nothing in the history of the times, which would justify the opinion that the confidence reposed in the States was so implicit as to leave in them and their tribunals the power of resisting or defeating, in the form of law, the legitimate measures of the Union. The requisitions of Congress, under the Confederation, were as constitutionally obligatory as the laws enacted by the present Congress. That they were habitually disregarded is a fact of universal notoriety. With the knowledge of this fact, and under its full pressure, a convention was assembled to change the system. Is it so improbable that they should confer on the judicial department the power of construing the Constitution and laws of the Union in every case, in the last resort, and

Every well-ordered government must contain within itself the means of securing the execution of its own laws.

Requisitions of Congress habitually disregarded under the Confederation.

of preserving them from all violation from every quarter, so far as judicial decisions can preserve them, that this improbability should essentially affect the construction of the new system? We are told, and we are truly told, that the great change which is to give efficacy to the present system is its ability to act on individuals directly, instead of acting through the instrumentality of State governments. But ought not this ability, in reason and sound policy, to be applied directly to the protection of individuals employed in the execution of the laws, as well as to their coercion? Your laws reach the individual without the aid of any other power; why may they not protect him from punishment for performing his duty in executing them?

The counsel for Virginia endeavor to obviate the force of these arguments by saying that the dangers they suggest, if not imaginary, are inevitable; that the Constitution can make no provision against them; and that, therefore, in construing that instrument they ought to be excluded from our consideration. This state of things, they say, cannot arise until there shall be a disposition so hostile to the present political system as to produce a determination to destroy it; and when that determination shall be produced, its effects will not be restrained by parchment stipulations. The fate of the Constitution will not then depend on judicial decisions. But, should no appeal be made to force, the States can put an end to the government by refusing to act. They have only not to elect Senators, and it expires without a struggle.

It is very true that, whenever hostility to the existing system shall become universal, it will be also irresistible. The people made the Constitution and the people can

Power of the States to
destroy the Union.

unmake it. It is the creature of their will, and lives only by their will. But this supreme and irresistible power to make or to unmake resides only in the whole body of the people, not in any subdivision of

Supreme and irresistible power to make or to unmake the Constitution resides only in the whole body of the people.

them. The attempt of any of the parts to exercise it is usurpation, and ought to be repelled by those to whom the people have delegated their power of repelling it.

The acknowledged inability of the government, then, to sustain itself against the public will, and by force, or otherwise, to control the whole nation, is no sound argument in support of its constitutional inability to preserve itself against a section of the nation acting in opposition to the general will.

It is true that if all the States, or a majority of them, refuse to elect Senators, the legislative powers of the Union will be suspended. But if any one State shall refuse to elect them, the Senate will not on that account be the less capable of performing all its functions. The argument founded on this fact would seem rather to prove the subordination of the parts to the whole than the complete independ-

Not in a single State.

ence of any one of them. The framers of the Constitution were indeed unable to make any provisions which should protect the instrument against a general combination of the States, or of the people, for its destruction; and, conscious of this inability, they have not made the attempt. But they were able to provide against the operation of measures adopted in any one State, whose tendency might be to arrest the execution of the laws; and this it was the part of true wisdom to attempt. We think they have attempted it.

It has been also urged, as an additional objection to

the jurisdiction of the court, that cases between a State and one of its own citizens do not come within the general scope of the Constitution; and were obviously never intended to be made cognizable in the Federal courts. The State tribunals might be suspected of partiality in cases between itself, or its citizens, and aliens, or the citizens of another State, but not in proceedings by a State against its own citizens. That jealousy which might exist in the first case could not exist in the last, and therefore the judicial power is not extended to the last.

This is very true, so far as jurisdiction depends on the character of the parties; and the argument would have great force if urged to prove that this court could not establish the demand of a citizen upon his State, but is not entitled to the same force when urged to prove that this court cannot inquire whether the Constitution or laws of the United States protect a citizen from a prosecution instituted against him by a State. If jurisdiction depended entirely on the character of the parties, and was not given where the parties have not an original right to come into court, that part of the second section of the third article, which extends the judicial power to all cases arising under the Constitution and laws of the United States, would be mere surplusage. It is to give jurisdiction where the character of the parties would not give it that this very important part of the clause was inserted. It may be true that the partiality of the State tribunals, in ordinary controversies between a State and its citizens, was not apprehended, and therefore the judicial power of the Union was not extended to such cases; but this was not the sole nor the greatest object for which this department was created.

Judicial power of the Union extends to all cases arising under the Constitution and laws of the United States irrespective of citizenship of the parties.

A more important, a much more interesting object, was the preservation of the Constitution and laws of the United States, so far as they can be preserved by judicial authority; and therefore the jurisdiction of the courts of the Union was expressly extended to all cases arising under that Constitution and those laws. If the Constitution or laws may be violated by proceedings instituted by a State against its own citizens, and if that violation may be such as essentially to affect the Constitution and the laws, such as to arrest the progress of government in its constitutional course, why should these cases be excepted from that provision which extends the judicial power of the Union to *all* cases arising under the Constitution and laws?

After bestowing on this subject the most attentive consideration, the court can perceive no reason founded on the character of the parties for introducing an exception which the Constitution has not made; and we think that the judicial power, as originally given, extends to all cases arising under the Constitution or a law of the United States, whoever may be the parties.

It has been also contended that this jurisdiction, if given, is original, and cannot be exercised in the appellate form.

The words of the Constitution are, "in all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction."

This distinction between original and appellate jurisdiction excludes, we are told, in all cases, the exercise of the one where the other is given.

The Constitution gives the Supreme Court original jurisdiction in certain enumerated cases, and gives it appellate jurisdiction in all others. Among those in which jurisdiction must be exercised in the appellate form are cases arising under the Constitution and laws of the United States. These provisions of the Constitution are equally obligatory, and are to be equally respected. If a State be a party, the jurisdiction of this court is original; if the case arise under a Constitution or a law, the jurisdiction is appellate. But a case to which a State is a party may arise under the Constitution or a law of the United States. What rule is applicable to such a case? What, then, becomes the duty of the court? Certainly, we think, so to construe the Constitution as to give effect to both provisions, as far as it is possible to reconcile them, and not to permit their seeming repugnancy to destroy each other. We must endeavor so to construe them as to preserve the true intent and meaning of the instrument.

In one description of cases the jurisdiction of the court is founded entirely on the character of the parties; *Idem.* and the nature of the controversy is not contemplated by the Constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the Constitution. In these the nature of the case is everything, the character of the parties nothing. When, then, the Constitution declares the jurisdiction, in cases where a State shall be a party, to be original, and, in all cases arising under the Constitution or a law, to be appellate,—the conclusion seems irresistible that its framers designed to include in the first class

those cases in which jurisdiction is given because a State is a party; and to include in the second those in which jurisdiction is given because the case arises under the Constitution or a law.

This reasonable construction is rendered necessary by other considerations.

That the Constitution or a law of the United States is involved in a case, and makes a part of it, may appear in the progress of a cause in which the ^{Idem.} courts of the Union, but for that circumstance, would have no jurisdiction, and which, of consequence, could not originate in the Supreme Court. In such a case the jurisdiction can be exercised only in its appellate form. To deny its exercise in this form is to deny its existence, and would be to construe a clause, dividing the power of the Supreme Court, in such manner as, in a considerable degree, to defeat the power itself. All must perceive that this construction can be justified only where it is absolutely necessary. We do not think the article under consideration presents that necessity.

It is observable that in this distributive clause no negative words are introduced. This observation is not made for the purpose ^{Marbury v. Madison cited.} of contending that the Legislature may "apportion the judicial power between the supreme and inferior courts according to its will." That would be, as was said by this court in the case of *Marbury v. Madison*, to render the distributive clause "mere surplusage," to make it "form without substance." This cannot, therefore, be the true construction of the article.

But although the absence of negative words will not authorize the Legislature to disregard the distribution of the power previously granted, their absence will justify

a sound construction of the whole article, so as to give every part its intended effect. It is admitted that "affirmative words are often in their operation negative of other objects than those affirmed;" and that, where "a negative or exclusive sense must be given to them, or they have no operation at all," they must receive that negative or exclusive sense. But where they have full operation without it, where it would destroy some of the most important objects for which the power was created, then, we think, affirmative words ought not to be construed negatively.

The Constitution declares that in cases where a State is a party the Supreme Court shall have original jurisdiction; but does not say that its appellate jurisdiction shall not be exercised in cases where, from their nature, appellate jurisdiction is given, whether a State be or be not a party. It may be conceded that, where the case is of such a nature as to admit of its originating in the Supreme Court, it ought to originate there; but where from its nature it cannot originate in that court, these words ought not to be so construed as to require it. There are many cases in which it would be found extremely difficult, and subversive of the spirit of the Constitution, to maintain the construction that appellate jurisdiction cannot be exercised where one of the parties might sue or be sued in this court.

The Constitution defines the jurisdiction of the Supreme Court, but does not define that of the inferior courts. Can it be affirmed that a State might not sue the citizen of another State in a Circuit Court? Should the Circuit Court decide for or against its jurisdiction, should

Original and appellate jurisdiction of the Federal courts.

Rational construction of provision of the Constitution.

it dismiss the suit, or give judgment against the State, might not its decision be revised in the Supreme Court? The argument is that it could not; and the very clause which is urged to prove that the Circuit Court could give no judgment in the case is also urged to prove that its judgment is irreversible. A supervising court, whose peculiar province it is to correct the errors of an inferior court, has no power to correct a judgment given without jurisdiction; because, in the same case, that supervising court has original jurisdiction. Had negative words been employed, it would be difficult to give them this construction, if they would admit of any other. But without negative words this irrational construction can never be maintained.

So, too, in the same clause, the jurisdiction of the court is declared to be original "in cases affecting ambassadors, other public ministers, and consuls." There is, perhaps,

Jurisdiction in cases affecting ambassadors, etc., original.

no part of the article under consideration so much required by national policy as this; unless it be that part which extends the judicial power "to all cases arising under the Constitution, laws, and treaties of the United States." It has been generally held that the State courts have a concurrent jurisdiction with the Federal courts in cases to which the judicial power is extended, unless the jurisdiction of the Federal courts be rendered exclusive by the words of the third article. If the words, "to all cases," give exclusive jurisdiction in cases affecting foreign ministers, they may also give exclusive jurisdiction, if such be the will of Congress, in cases arising under the Constitution, laws, and treaties of the United States. Now suppose an individual were to sue a foreign minister in a State court, and that court were to main-

tain its jurisdiction and render judgment against the minister, could it be contended that this court would be incapable of revising such judgment because the Constitution had given it original jurisdiction in the case? If this could be maintained, then a clause, inserted for the purpose of excluding the jurisdiction of all other courts than this, in a particular case, would have the effect of excluding the jurisdiction of this court in that very case, if the suit were to be brought in another court, and that court were to assert jurisdiction. This tribunal, according to the argument which has been urged, could neither revise the judgment of such other court, nor suspend its proceedings; for a writ of prohibition, or any other similar writ, is in the nature of appellate process.

Foreign consuls frequently assert in our prize courts the claims of their fellow-subjects. These suits are maintained by them as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned. It would be extremely mischievous to withhold its exercise. Yet the consul is a party on the record. The truth is, that, where the words confer only appellate jurisdiction, original jurisdiction is most clearly not given; but where the words admit of appellate jurisdiction, the power to take cognizance of the suit originally does not necessarily negative the power to decide upon it on an appeal, if it may originate in a different court.

It is, we think, apparent, that to give this distributive clause the interpretation contended for, to give to its affirmative words a negative operation in every possible case, would in some instances defeat the obvious intention of

Jurisdiction appellate in case if brought in State court against ambassador, etc.

Suits in prize courts by foreign consuls, jurisdiction of Supreme Court appellate.

Article in question must be construed so as to promote its general intention.

the article. Such an interpretation would not consist with those rules which from time immemorial have guided courts in their construction of instruments brought under their consideration. It must therefore be discarded. Every part of the article must be taken into view, and that construction adopted which will consist with its words and promote its general intention. The court may imply a negative from affirmative words, where the implication promotes, not where it defeats, the intention.

If we apply this principle, the correctness of which we believe will not be controverted, to the distributive clause under consideration, the result, we think, would be this: the original jurisdiction of the

Construction of distributive clause in Constitution — Original and appellate jurisdiction — Result stated.

Supreme Court, in cases where a State is a party, refers to those cases in which, according to the grant of power made in the preceding clause, jurisdiction might be exercised in consequence of the character of the party, and an original suit might be instituted in any of the Federal courts; not to those cases in which an original suit might not be instituted in a Federal court. Of the last description is every case between a State and its citizens, and, perhaps, every case in which a State is enforcing its penal laws. In such cases, therefore, the Supreme Court cannot take original jurisdiction. In every other case, that is, in every case to which the judicial power extends, and in which original jurisdiction is not expressly given, that judicial power shall be exercised in the appellate, and only in the appellate form. The original jurisdiction of this court cannot be enlarged, but its appellate jurisdiction may be exercised in every case cognizable, under the third article of the Constitution, in the Federal courts,

in which original jurisdiction cannot be exercised; and the extent of this judicial power is to be measured, not by giving the affirmative words of the distributive clause a negative operation in every possible case, but by giving their true meaning to the words which define its extent.

The counsel for the defendant in error urge, in opposition to this rule of construction, some *dicta* of the court in the case of *Marbury v. Madison*.

Dicta in Marbury v. Madison.

It is a maxim not to be disregarded that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

In the case of *Marbury v. Madison*, the single question before the court, so far as that case can be applied to this, was whether the Legislature could give this court original jurisdiction in a case in which the Constitution had clearly not given it, and in which no doubt respecting the construction of the article could possibly be raised. The court decided, and, we think, very properly, that the Legislature could not give original jurisdiction in such a case. But in the reasoning of the court in support of this decision some expressions are used which go far beyond it. The counsel for *Marbury*

Question in Marbury v. Madison whether Legislature could give original jurisdiction to Supreme Court.

had insisted on the unlimited discretion of the Legislature in the apportionment of the judicial power; and it is against this argument that the reasoning of the court is directed. Original and appellate jurisdiction — Construction of Constitution. They say that, if such had been the intention of the article, "it would certainly have been useless to proceed farther than to define the judicial power, and the tribunals in which it should be vested." The court says that such a construction would render the clause, dividing the jurisdiction of the court into original and appellate, totally useless; that "affirmative words are often, in their operation, negative of other objects than those which are affirmed; and in this case (in the case of *Marbury v. Madison*) a negative or exclusive sense must be given to them, or they have no operation at all." "It cannot be presumed," adds the court, "that any clause in the Constitution is intended to be without effect; and therefore such a construction is inadmissible, unless the words require it."

The whole reasoning of the court proceeds upon the idea that the affirmative words of the clause, giving one sort of jurisdiction, Negative operation of affirmative words. must imply a negative of any other sort of jurisdiction, because otherwise the words would be totally inoperative; and this reasoning is advanced in a case to which it was strictly applicable. If in that case original jurisdiction could have been exercised, the clause under consideration would have been entirely useless. Having such cases only in its view, the court lays down a principle which is generally correct, in terms much broader than the decision, and not only much broader than the reasoning with which that decision is supported, but in some instances contradictory to its

principle. The reasoning sustains the negative operation of the words in that case, because otherwise the clause would have no meaning whatever, and because such operation was necessary to give effect to the intention of the article. The effort now made is to apply the conclusion to which the court was conducted by that reasoning in the particular case, to one in which the words have their full operation when understood affirmatively, and in which the negative or exclusive sense is to be so used as to defeat some of the great objects of the article.

To this construction the court cannot give its assent. The general expressions in the case of *Marbury v. Madison* must be understood with the limitations which are given to them in this opinion; limitations which in no degree affect the decision in that case, or the tenor of its reasoning.

The counsel who closed the argument put several cases for the purpose of illustration, which he supposed to arise under the Constitution, and yet to be apparently without the jurisdiction of the court.

Cases arising under Constitution but without jurisdiction of the court — Illustrations of counsel.

Were a State to lay a duty on exports, to collect the money and place it in her treasury, could the citizen who paid it, he asks, maintain a suit in this court against such State to recover back the money?

Perhaps not. Without, however, deciding such supposed case, we may say that it is entirely unlike that under consideration.

The citizen who has paid his money to his State under a law that is void is in the same situation with every other person who has paid money by mistake. The law raises an *assumpsit* to return the money, and it is upon that *assumpsit* that the action is to be maintained. To refuse

to comply with this *assumpsit* may be no more a violation of the Constitution than to refuse to comply with any other; and as the Federal courts never had jurisdiction over contracts between a State and its citizens, they may have none over this. But let us so vary the supposed case as to give it a real resemblance to that under consideration. Suppose a citizen to refuse to pay this export duty, and a suit to be instituted for the purpose of compelling him to pay it. He pleads the Constitution of the United States in bar of the action, notwithstanding which the court gives judgment against him. This would be a case arising under the Constitution, and would be the very case now before the court.

Suit to compel citizen to pay export duty levied by a State; jurisdiction of Federal courts.

We are also asked, if a State should confiscate property secured by a treaty, whether the individual could maintain an action for that property.

If the property confiscated be debts, our own experience informs us that the remedy of the creditor against his debtor remains. If it be land which is secured by a treaty, and afterwards confiscated by a State, the argument does not assume that this title, thus secured, could be extinguished by an act of confiscation. The injured party, therefore, has his remedy against the occupant of the land for that which the treaty secures to him, not against the State for money which is not secured to him.

Jurisdiction where State confiscates property secured by treaty; illustration.

The case of a State which pays off its own debts with paper money no more resembles this than do those to which we have already adverted. The courts have no jurisdiction over the contract. They cannot enforce it, nor judge of its violation. Let it be that the act discharging the debt

Jurisdiction where State pays off its own debts with paper money; illustration.

is a mere nullity, and that it is still due. Yet the Federal courts have no cognizance of the case. But suppose a State to institute proceedings against an individual, which depended on the validity of an act emitting bills of credit; suppose a State to prosecute one of its citizens for refusing paper money, who should plead the Constitution in bar of such prosecution. If his plea should be overruled, and judgment rendered against him, his case would resemble this; and unless the jurisdiction of this court might be exercised over it, the Constitution would be violated, and the injured party be unable to bring his case before that tribunal to which the people of the United States have assigned all such cases.

It is most true that this court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the Legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it, if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is, to exercise our best judgment, and conscientiously to perform our duty. In doing this, on the present occasion, we find this tribunal invested with appellate jurisdiction in *all* cases arising under the Constitution and laws of the United States. We find no exception to this grant, and we cannot insert one.

Duty of court to decide cases brought before it.

Supreme Court invested with appellate jurisdiction in all cases arising under Constitution and laws of United States.

To escape the operation of these comprehensive words, the counsel for the defendant has mentioned instances in which the Constitution might be violated without giving jurisdiction to this court. These words, therefore, however universal in their expression, must, he contends, be limited and controlled in their construction by circumstances. One of these instances is the grant by a State of a patent of nobility. The court, he says, cannot annul this grant.

This may be very true; but by no means justifies the inference drawn from it. The article does not extend the judicial power to every violation of the Constitution which may possibly take place, but to "a case in law or equity" in which a right under such law is asserted in a court of justice. If the question cannot be brought into a court, then there is no case in law or equity, and no jurisdiction is given by the words of the article. But if, in any controversy depending in a court, the cause should depend on the validity of such a law, that would be a case arising under the Constitution, to which the judicial power of the United States would extend. The same observation applies to the other instances with which the counsel who opened the cause has illustrated this argument. Although they show that there may be violations of the Constitution of which the courts can take no cognizance, they do not show that an interpretation more restrictive than the words themselves import ought to be given to this article. They do not show that there can be "a case in law or equity," arising under the Constitution, to which the judicial power does not extend.

Judicial power does not extend to every violation of the Constitution.

Extent of judicial power.

We think, then, that, as the Constitution originally stood, the appellate jurisdiction of this court, in all cases arising under the Constitution, laws, or treaties of the United States, was not arrested by the circumstance that a State was a party.

This leads to the consideration of the Eleventh Amendment.

It is in these words: "The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The Eleventh Amendment.

It is a part of our history, that, at the adoption of the Constitution, all the States were greatly indebted; and the apprehension that these debts might be prosecuted in the Federal courts formed a very serious objection to that instrument. Suits were instituted and the court maintained its jurisdiction. The alarm was general; and to quiet the apprehensions that were so extensively entertained, this amendment was proposed in Congress, and adopted by the State Legislatures. That its motive was not to maintain the sovereignty of a State from the degradation supposed to attend a compulsory appearance before the tribunal of the nation may be inferred from the terms of the amendment. It does not comprehend controversies between two or more States, or between a State and a foreign State. The jurisdiction of the court still extends to these cases; and in these a State may still be sued. We must ascribe the amendment, then to some other cause than the dignity of a State. There is no difficulty in finding this cause. Those who were inhibited

History of adoption of Eleventh Amendment.

from commencing a suit against a State, or from prosecuting one which might be commenced before the adoption of the amendment, were persons who might probably be its credit-
To what suits the amendment extends.
 ors. There was not much reason to fear that foreign or sister States would be creditors to any considerable amount, and there was reason to retain the jurisdiction of the court in those cases, because it might be essential to the preservation of peace. The amendment, therefore, extended to suits commenced or prosecuted by individuals, but not to those brought by States.

The first impression made on the mind by this amendment is that it was intended for those cases, and for those only, in which
Amendment applies to suits by individuals upon demands against States.
 some demand against a State is made by an individual in the courts of the Union. If we consider the causes to which it is to be traced, we are conducted to the same conclusion. A general interest might well be felt in leaving to a State the full power of consulting its convenience in the adjustment of its debts, or of other claims upon it; but no interest could be felt in so changing the relations between the whole and its parts as to strip the government of the means of protecting, by the instrumentality of its courts, the Constitution and laws from active violation.

The words of the amendment appear to the court to justify and require this construction. The judicial power is not "to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State," etc.

What is a suit? We understand it to be the prosecution or pursuit of some claim, demand, or request. In law language it is the prosecution of some demand in a

court of justice. The remedy for every species of wrong is, says Judge Blackstone, "the being put in possession of that right whereof the party injured is deprived." "The instruments whereby this remedy is obtained are a diversity of suits and actions, which are defined by the Mirror to be the 'lawful demand of one's right.' Or, as Bracton and Fleta express it, in the words of Justinian, '*jus prosequendi in judicio quod alicui debetur.*'" Blackstone then proceeds to describe every species of remedy by suit; and they are all cases where the party suing claims to obtain something to which he has a right.

To commence a suit is to demand something by the institution of process in a court of justice; and to prosecute the suit is, according to the common acceptance of language, to continue that demand. By a suit commenced by an individual against a State we should understand process sued out by that individual against the State, for the purpose of establishing some claim against it by the judgment of a court; and the prosecution of that suit is its continuance. Whatever may be the stages of its progress, the actor is still the same. Suits had been commenced in the Supreme Court against some of the States

Object of the amendment.

before this amendment was introduced into Congress, and others might be commenced before it should be adopted by the State Legislatures, and might be depending at the time of its adoption. The object of the amendment was not only to prevent the commencement of future suits, but to arrest the prosecution of those which might be commenced when this article should form a part of the Constitution. It therefore embraces both objects; and its meaning is, that the judicial power shall not be construed to extend

to any suit which may be commenced, or which, if already commenced, may be prosecuted against a State by the citizen of another State. If a suit brought in one court, and carried by legal process to a supervising court, be a continuation of the same suit, then this suit is not commenced nor prosecuted against a State. It is clearly, in its commencement, the suit of a State against an individual, which suit is transferred to this court, not for the purpose of asserting any claim against the State, but for the purpose of asserting a constitutional defense against a claim made by a State.

Applies to suit commenced or prosecuted against a State.

A writ of error is defined to be a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law. "If," says my Lord Coke, "by the writ of error the plaintiff may recover or be restored to anything, it may be released by the name of an action." In Bacon's Abridgment, tit. Error, L., it is laid down that, "where by a writ of error the plaintiff shall recover or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar." And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his Reports. A writ of error, then, is in the nature of a suit or action, when it is to restore the party who obtains it to the possession of anything which is

Writ of error defined.

withheld from him, not when its operation is entirely defensive.

This rule will apply to writs of error from the courts of the United States, as well as to those writs in England.

Under the Judiciary Act the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a State obtains a judgment against an individual, and the court rendering such judgment overrules a defense set up under the Constitution or laws of the United States, the transfer of this record into the Supreme Court, for the sole purpose of inquiring whether the judgment violates the Constitution or laws of the United States, can with no propriety, we think, be denominated a suit commenced or prosecuted against the State whose judgment is so far re-examined. Nothing is demanded from the State. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be

by writ of error, or appeal, no claim is asserted, no demand is made, by the original defendant; he only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the Constitution and laws of the Union.

The only part of the proceeding which is in any manner personal is the citation. And what is the citation? It is simply notice to

Writ of error—Citation to opposite party.

the opposite party that the record is transferred into another court, where he may appear or decline to appear, as his judgment or inclination may determine. As the party who has obtained a judgment is out of court and may, therefore, not know that his cause is removed, common justice requires that notice of the fact should be given him. But this notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his non-appearance, but the judgment is to be re-examined, and reversed, or affirmed, in like manner as if the party had appeared and argued his cause.

The point of view in which this writ of error, with its citation, has been considered uniformly in the courts of the Union has been well illustrated by a reference to the

Writs of error in suits instituted by the United States have uniformly issued.

course of this court in suits instituted by the United States. The universally received opinion is that no suit can be commenced or prosecuted against the United States; that the Judiciary Act does not authorize such suits. Yet writs of errors, accompanied with citations, have uniformly issued for the removal of judgments in favor of the United States into a superior court, where they have, like those in favor of an individual, been re-

examined, and affirmed or reversed. It has never been suggested that such writ of error was a suit against the United States, and therefore not within the jurisdiction of the appellate court.

It is, then, the opinion of the court that the defendant, who removes a judgment rendered against him by a State court into this court, for the purpose of re-examining the question, whether that judgment be in violation of the Constitution or laws of the United States, does not commence or prosecute a suit against the State, whatever may be its opinion, where the effect of the writ may be to restore the party to the possession of a thing which he demands.

Writ of error to review judgment of State court not the commencement or prosecution of a suit against the State.

But should we in this be mistaken, the error does not affect the case now before the court. If this writ of error be a suit in the sense of the Eleventh Amendment, it is not a suit commenced or prosecuted "by a citizen of another State, or by a citizen or subject of any foreign State." It is not, then, within the amendment, but is governed entirely by the Constitution as originally framed; and we have already seen that in its origin the judicial power was extended to all cases arising under the Constitution or laws of the United States, without respect to parties.

2d. The second objection to the jurisdiction of the court is that its appellate power cannot be exercised, in any case, over the judgment of a State court.

Objection raised to exercise of appellate power over judgment of a State court.

This objection is sustained chiefly by arguments drawn from the supposed total separation of the judiciary of a State from that of the Union, and their entire inde-

pendence of each other. The argument considers the Federal judiciary as completely foreign to that of a State; and as being no more connected with it, in any respect whatever, than the court of a foreign State. If this hypothesis be just, the argument founded on it is equally so; but if the hypothesis be not supported by the Constitution, the argument fails with it.

This hypothesis is not founded on any words in the Constitution which might seem to countenance it, but on the unreasonableness of giving a contrary construction to words which seem to require it, and on the incompatibility of the application of the appellate jurisdiction to the judgments of State courts with that constitutional relation which subsists between the government of the Union and the governments of those States which compose it.

Let this unreasonableness, this total incompatibility, be examined.

That the United States form, for many and for most important purposes, a single nation has not yet been denied. In war we are one people. In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one. And the government which is alone capable of controlling and managing their interests in all these respects is the government of the Union. It is their government, and in that character they have no other. America has chosen to be, in many respects, and to many purposes, a nation; and for all these purposes her government is complete; to all these objects it is competent.

The United States form a single nation for most important purposes.

The States are constituent parts of the United States.

The people have declared that in the exercise of all powers given for these objects it is supreme. It can, then,

in effecting these objects, legitimately control all individuals or governments within the American territory. The Constitution and laws of a State, so far as they are repugnant to the Constitution and laws of the United States, are absolutely void. These States are constituent parts of the United States. They are members of one great empire,—for some purposes sovereign, for some purposes subordinate.

In a government so constituted is it unreasonable that the judicial power should be competent to give efficacy to the constitutional laws of the Legislature? That department can decide on the validity of the Constitution or law of a State, if it be repugnant to the Constitution or to a law of the United States. Is it unreasonable that it should also be empowered to decide on the judgment of a State tribunal enforcing such unconstitutional law? Is it so very unreasonable as to furnish a justification for controlling the words of the Constitution?

We think it is not. We think that, in a government acknowledgedly supreme with respect to objects of vital interest to the nation, there is nothing inconsistent with sound reason, nothing incompatible with the nature of government, in making all its departments supreme, so far as respects those objects, and so far as is necessary to their attainment. The exercise of the appellate power over those judgments of the State tribunals, which may contravene the Constitution or laws of the United States, is, we believe, essential to the attainment of those objects.

The propriety of intrusting the construction of the Constitution, and laws made in pursuance thereof, to the judiciary of the Union, has not, we believe, as yet been drawn into question. It seems to be a corollary from

Appellate power over judgments of State tribunals, when essential.

this political axiom, that the Federal courts should either possess exclusive jurisdiction in such cases, or a power to revise the judgment rendered in them by State tribunals. If the Federal and State

Exclusive jurisdiction of Supreme Court ultimately to construe Constitution and laws of United States.

courts have concurrent jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States; and if a case of this description brought in a State court cannot be removed before judgment, nor revised after judgment, then the construction of the Constitution, laws, and treaties of the United States is not confided particularly to their judicial department, but is confided equally to that department and to the State courts, however they may be constituted. "Thirteen independent courts," says a very celebrated statesman (and we have now more than twenty such courts), "of final jurisdiction over the same causes, arising upon the same laws, is a hydra in government, from which nothing but contradiction and confusion can proceed."

Dismissing the unpleasant suggestion that any motives, which may not be fairly avowed, or which ought not to exist, can ever influence a State or its courts, the necessity of uniformity, as well as correctness, in expounding the Constitution and laws of the United States, would itself suggest the propriety of vesting in some single tribunal the power of deciding, in the last resort, all cases in which they are involved.

We are not restrained, then, by the political relations between the General and State governments, from construing the words of the Constitution, defining the judicial power, in their true sense. We are not bound to construe them more restrictively than they naturally import.

They give to the Supreme Court appellate jurisdiction in all cases arising under the Constitution, laws, and treaties of the United States. The words are broad enough to comprehend all cases of this description, in whatever court they may be decided. In expounding them we may be permitted to take into view those considerations to which courts have always allowed great weight in the exposition of laws.

Idem. The framers of the Constitution would naturally examine the state of things existing at the time; and their work sufficiently attests that they did so. All acknowledge that they were convened for the purpose of strengthening the Confederation by enlarging the powers of the government, and by giving efficacy to those which it before possessed, but could not exercise. They inform us themselves, in the instrument they presented to the American public, that one of its objects was to form a more perfect union. Under such circumstances we certainly should not expect to find in that instrument a diminution of the powers of the actual government.

Object of Constitution to form a more perfect union. Previous to the adoption of the Confederation Congress established courts which received appeals in prize causes decided in the courts of the respective States. This power of the government to establish tribunals for these appeals was thought consistent with, and was founded on, its political relations with the States. These courts did exercise appellate jurisdiction over those cases decided in the State courts to which the judicial power of the Federal Government extended.

Appellate jurisdiction in prize causes previous to Confederation. The Confederation gave to Congress the power "of

establishing courts for receiving and determining finally appeals in all cases of captures."

This power was uniformly construed to authorize those courts to receive appeals from the sentences of State courts, and to affirm or reverse them. State tribunals are not mentioned; but this clause in the Confederation necessarily com- Under the Confederation. prises them. Yet the relation between the General and State governments was much weaker, much more lax, under the Confederation than under the present Constitution; and the States being much more completely sovereign, their institutions were much more independent.

The convention which framed the Constitution, on turning their attention to the judicial power, found it limited to a few ob- Action of convention which framed the Constitution with respect to appellate jurisdiction. jects, but exercised, with respect to some of those objects, in its appellate form, over the judgments of the State courts. They extend it, among other objects, to all cases arising under the Constitution, laws and treaties of the United States, and in a subsequent clause declare that in such cases the Supreme Court shall exercise appellate jurisdiction. Nothing seems to be given which would justify the withdrawal of a judgment rendered in a State court on the Constitution, laws or treaties of the United States from this appellate jurisdiction.

Great weight has always been attached, and very rightly attached, to contemporaneous exposition. No question, it is believed, has arisen to which this principle applies more unequivocally than to that now under consideration. Great weight attached to contemporaneous exposition.

The opinion of the Federalist has always been consid-

ered as of great authority. It is a complete commentary on our Constitution, and is appealed to by all parties in the questions to which that instrument has given birth. Its intrinsic merit entitles it to this high rank, and the part two of its authors performed in framing the Constitution put it very much in their power to explain the views with which it was framed. These essays having been published while the Constitution was before the Nation for adoption or rejection, and having been written in answer to objections founded entirely on the extent of its powers, and on its diminution of State sovereignty, are entitled to the more consideration where they frankly avow that the power objected to is given, and defend it.

The Federalist a complete commentary on our Constitution.

In discussing the extent of the judicial power, the Federalist says, "Here another question occurs: What relation would subsist between the National and State courts in these instances of concurrent jurisdiction? I answer, that an appeal would certainly lie from the latter to the Supreme Court of the United States. The Constitution in direct terms gives an appellate jurisdiction to the Supreme Court in all the enumerated cases of Federal cognizance in which it is not to have an original one, without a single expression to confine its operation to the inferior Federal courts. The objects of appeal, not the tribunals from which it is to be made, are alone contemplated. From this circumstance, and from the reason of the thing, it ought to be construed to extend to the State tribunals. Either this must be the case, or the local courts must be excluded from a concurrent jurisdiction in matters of National concern, else the judicial authority

What the Federalist says of extent of judicial power.

of the Union may be eluded at the pleasure of every plaintiff or prosecutor. Neither of these consequences ought, without evident necessity, to be involved; the latter would be entirely inadmissible, as it would defeat some of the most important and avowed purposes of the proposed government, and would essentially embarrass its measures. Nor do I perceive any foundation for such a supposition. Agreeably to the remark already made, the National and State systems are to be regarded as ONE WHOLE. The courts of the latter will of course be natural auxiliaries to the execution of the laws of the Union, and an appeal from them will as naturally lie to that tribunal which is destined to unite and assimilate the principles of natural justice and the rules of National decision. The evident aim of the plan of the National convention is that all the causes of the specified classes shall, for weighty public reasons, receive their original or final determination in the courts of the Union. To confine, therefore, the general expressions, which give appellate jurisdiction to the Supreme Court, to appeals from the subordinate Federal courts, instead of allowing their extension to the State courts, would be to abridge the latitude of the terms, in subversion of the intent, contrary to every sound rule of interpretation."

A contemporaneous exposition of the Constitution, certainly of not less authority than that which has just been cited, is the Judiciary Act itself. We know that in the Congress which passed that act were many eminent members of the Convention which formed the Constitution. Not a single individual, so far as is known, supposed that part of the act, which gives the Supreme Court appellate jurisdiction over the judgments

*The Judiciary Act itself
a contemporaneous ex-
position of the Consti-
tution.*

of the State courts in the cases therein specified, to be unauthorized by the Constitution.

While on this part of the argument, it may be also material to observe that the uniform decisions of this court on the point now under consideration have been assented to, with a single exception, by the courts of every State in the Union whose judgments have been revised. It has been the unwelcome duty of this tribunal to reverse the judgments of many State courts in cases in which the strongest State feelings were engaged. Judges whose talents and character would grace any bench, to whom a disposition to submit to jurisdiction that is usurped, or to surrender their legitimate powers, will certainly not be imputed, have yielded without hesitation to the authority by which their judgments were reversed, while they, perhaps, disapproved the judgment of reversal.

Uniform decisions of the Supreme Court on the point assented to by the courts of the States.

This concurrence of statesmen, of legislators, and of judges, in the same construction of the Constitution, may justly inspire some confidence in that construction.

In opposition to it, the counsel who made this point has presented in a great variety of forms the idea already noticed, that the Federal and State courts must of necessity, and from the nature of the Constitution, be in all things totally distinct and independent of each other. If this court can correct the errors of the courts of Virginia, he says, it makes them courts of the United States, or becomes itself a part of the judiciary of Virginia.

Supervising power of Federal court as provided in Constitution not inconsistent with independence of State courts.

But it has been already shown that neither of these consequences necessarily follows. The American people

may certainly give to a national tribunal a supervising power over those judgments of the State courts which may conflict with the Constitution, laws, or treaties of the United States, without converting them into Federal courts, or converting the National into a State tribunal. The one court still derives its authority from the State, the other still derives its authority from the Nation.

If it shall be established, he says, that this court has appellate jurisdiction over the State courts in all cases enumerated in the third article of the Constitution, a complete consolidation of the States, so far as respects judicial power, is produced.

But certainly the mind of the gentleman who urged this argument is too accurate not to perceive that he has carried it too far; that the premises by no means justify the conclusion. "A complete consolidation of the States, so far as respects the judicial power," would authorize the Legislature to confer on the Federal courts appellate jurisdiction from the State courts in all cases whatsoever. The distinction between such a power, and that of giving appellate jurisdiction in a few specified cases in the decision of which the Nation takes an interest, is too obvious not to be perceived by all.

This opinion has been already drawn out to too great a length to admit of entering into a particular consideration of the various forms in which the counsel who made this point has, with much ingenuity, presented his argument to the court. The argument in all its forms is essentially the same. It is founded, not on the words of the Constitution, but on its spirit, a spirit extracted not from the words of the instrument, but from his view of the nature of our Union, and of the great fundamental principles on which the fabric stands.

To this argument, in all its forms, the same answer may be given. Let the nature and objects of our Union be considered; let the great fundamental principles on which the fabric stands be examined; and we think the result must be that there is nothing so extravagantly absurd, in giving to the court of the Nation the power of revising the decisions of local tribunals on questions which affect the Nation, as to require that words which import this power should be restricted by a forced construction. The question, then, must depend on the words themselves; and on their construction we shall be the more readily excused for not adding to the observations already made, because the subject was fully discussed and exhausted in the case of *Martin v. Hunter*.

3d. We come now to the third objection, which, though differently stated by the counsel, is substantially the same. One gentleman has said that the Judiciary Act does not give jurisdiction in the case.

The cause was argued in the State court on a case agreed by the parties, which states the prosecution under a law for selling lottery tickets, which is set forth, and further states the act of Congress by which the city of Washington was authorized to establish the lottery. It then states that the lottery was regularly established by virtue of the act, and concludes with referring to the court the questions, whether the act of Congress be valid? whether, on its just construction, it constitutes a bar to the prosecution? and whether the act of assembly, on which the prosecution is founded, be not itself invalid? These questions were decided against the operation of the

Jurisdiction given by the Judiciary Act.

Validity of act of Congress authorizing lottery to be established.

act of Congress, and in favor of the operation of the act of the State.

If the twenty-fifth section of the Judiciary Act be inspected, it will at once be perceived that it comprehends expressly the case under consideration.

But it is not upon the letter of the act that the gentleman who stated this point in this form founds his argument. Both gentlemen concur substantially in their views of this part of the case. They deny that the act of Congress on which the plaintiff in error relies is a law of the United States; or, if a law of the United States, is within the second clause of the sixth article.

In the enumeration of the powers of Congress, which is made in the eighth section of the first article, we find that of exercising exclusive legislation over such district as shall become the seat of government.

Exclusive power of Congress to legislate for the district embracing the seat of government.

This power, like all others which are specified, is conferred on Congress as the Legislature of the Union; for, strip them of that character, and they would not possess it. In no other character can it be exercised. In legislating for the district, they necessarily preserve the character of the Legislature of the Union; for it is in that character alone that the Constitution confers on them this power of exclusive legislation. This proposition need not be enforced.

The second clause of the sixth article declares that "this Constitution, and the laws of the United States which shall be made in pursuance thereof, shall be the supreme law of the land."

The clause which gives exclusive jurisdiction is unquestionably a part of the Constitution, and as such binds all the United States. Those who contend that acts of

Congress made in pursuance of this power do not, like acts made in pursuance of other powers, bind the Nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on and exercised by Congress as the Legislature of the Union, is not a law of the United States, and does not bind them.

One of the gentlemen sought to illustrate his proposition, that Congress, when legislating for the District, assumed a distinct character, and was reduced to a mere local Legislature, whose laws could possess no obligation out of the ten miles square, by a reference to the complex character of this court. It is, they say, a court of common law and a court of equity. Its character, when sitting as a court of common law, is as distinct from its character, when sitting as a court of equity, as if the powers belonging to those departments were vested in different tribunals. Though united in the same tribunal, they are never confounded with each other.

Without inquiring how far the union of different characters in one court may be applicable, in principle, to the union in Congress of the power of exclusive legislation in some places, and of limited legislation in others, it may be observed that the forms of proceedings in a court of law are so totally unlike the forms of proceedings in a court of equity that a mere inspection of the record gives decisive information of the character in which the court sits, and consequently of the extent of its powers. But if the forms of proceeding were precisely the same, and the court the same, the distinction would disappear.

Character in which Congress acts when exercising its powers of exclusive legislation.

Since Congress legislates in the same forms, and in the same character, in virtue of powers of equal obligation, conferred in the same instrument, when exercising its exclusive powers of legislation, as well as when exercising those which are limited, we must inquire whether there be anything in the nature of this exclusive legislation which necessarily confines the operation of the laws made in virtue of this power to the place with a view to which they are made.

Connected with the power to legislate within this district is a similar power in forts, arsenals, dock-yards, etc. Congress has a right to punish murder in a fort, or other place, within its exclusive jurisdiction;

Acts of Congress with respect to forts, arsenals, etc.; illustration of legislation under exclusive and limited power.

but no general right to punish murder committed within any of the States. In the act for the punishment of crimes against the United States, murder committed within a fort, or any other place or district of country, under the sole and exclusive jurisdiction of the United States, is punished with death. Thus Congress legislates in the same act, under its exclusive and its limited powers.

The act proceeds to direct that the body of the criminal, after execution, may be delivered to a surgeon for dissection, and punishes any person who shall rescue such body during its conveyance from the place of execution to the surgeon to whom it is to be delivered.

Let these actual provisions of the law, or any other provisions which can be made on the subject, be considered with a view to the character in which Congress acts when exercising its powers of exclusive legislation.

If Congress is to be considered merely as a local Legislature, invested, as to this object, with powers limited

to the fort, or other place, in which the murder may be committed, if its general powers can-
Congress not a local Legislature. not come in aid of these local powers, how can the offense be tried in any other court than that of the place in which it has been committed? How can the offender be conveyed to, or tried in, any other place? How can he be executed elsewhere? How can his body be conveyed through a country under the jurisdiction of another sovereign, and the individual punished, who, within that jurisdiction, shall rescue the body?

Were any one State of the Union to pass a law for trying a criminal in a court not created by itself, in a place not within its jurisdiction, and direct the sentence to be executed without its territory, we should all perceive and acknowledge its incompetency to such a course of legislation. If Congress be not equally incompetent, it is because that body unites the powers of local legislation with those which are to operate through the Union, and may use the last in aid of the first; or because the power of exercising exclusive legislation draws after it, as an incident, the power of making that legislation effectual, and the incidental power may be exercised throughout the Union, because the principal power is given to that body as the Legislature of the Union.

So, in the same act, a person who, having knowledge of the commission of murder, or other felony, on the high seas, or within any fort, arsenal, dock-yard, magazine, or other place or district of country, within the sole and exclusive jurisdiction of the United States, shall conceal the same, etc., he shall be adjudged guilty of misprision of felony, and shall be adjudged to be imprisoned, etc.

It is clear that Congress cannot punish felonies generally, and, of consequence, cannot punish misprision of

felony. It is equally clear that a State Legislature, the State of Maryland, for example, cannot punish those who, in another State, conceal a felony committed in Maryland. How, then, is it that Congress, legislating exclusively for a fort, punishes those who, out of that fort, conceal a felony committed within it?

The solution and the only solution of the difficulty is that the power vested in Congress, as the Legislature of the United States, to legislate exclusively within any place ceded by a State, carries with it, as an incident, the right to make that power effectual. If a felon escape out of the State in which the act has been committed, the government cannot pursue him into another State, and apprehend him there, but must demand him from the executive power of that other State. If Congress were to be considered merely as the local Legislature for the fort or other place in which the offense might be committed, then this principle would apply to them as to other local Legislatures; and the felon, who should escape out of the fort, or other place, in which the felony may have been committed, could not be apprehended by the marshal, but must be demanded from the executive of the State. But we know that the principle does not apply; and the reason is that Congress is not a local Legislature, but exercises this particular power, like all its other powers, in its high character as the Legislature of the Union. The American people thought it a necessary power, and they conferred it for their own benefit. Being so conferred, it carries with it all those incidental powers which are necessary to its complete and effectual execution.

Power of Congress to legislate exclusively within any place ceded by a State carries the right to make that power effectual.

Whether any particular law be designated to operate

without the district or not depends on the words of that law. If it be designed so to operate, then the question, whether the power so exercised be incidental to the power of exclusive legislation, and be warranted by the Constitution, requires a consideration of that instrument. In such cases the Constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case. For the act of Congress directs that "no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said Constitution, treaties," etc.

The whole merits of this case, then, consist in the construction of the Constitution and the Act of Congress. The jurisdiction of the court, if acknowledged, goes no farther. This we are required to do without the exercise of jurisdiction.

The counsel for the State of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of Congress to such a case as this; but those arguments go to the construction of the Constitution, or of the law, or of both, and seem, therefore, rather calculated to sustain their cause upon its merits than to prove a failure of jurisdiction in the court.

After having bestowed upon this question the most deliberate consideration of which we are capable, the court is unanimously of opinion that the objections to its jurisdiction are not sustained, and that the motion ought to be overruled.

Motion denied.

NOTE.

Speaking of the appellate powers of the Supreme Court of the United States under the Constitution and under the 25th section of the Judiciary Act of 1789, Kent says: "A graver question could scarcely have arisen in that court, or one involving considerations of higher importance and delicacy, or more deeply affecting the permanency and tranquillity of the American Union." *Com.* (12th Ed.), I, 317.

"This vital question was again presented in 1821, in the great case of *Cohens v. Virginia*. The opinion of the Supreme Court was delivered by the Chief Justice, and his fame might well rest on that magnificent argument alone.

"The Cohens, plaintiffs in error, were indicted in the Sessions Court of Norfolk for selling lottery tickets in Virginia contrary to a State statute. Their defense, that the lottery was established and the tickets issued by the city of Washington, under its charter granted by Congress, was overruled, and they were fined one hundred dollars; from which judgment, the Sessions Court being the highest State court having jurisdiction of the case, they sued out a writ of error from the Supreme Court of the United States. The State of Virginia made it a test case, being represented by eminent counsel, who made and elaborately argued a motion to dismiss the writ for want of jurisdiction. This motion the court unanimously overruled, Marshall's opinion filling nearly sixty printed pages of compact and powerful argument, based upon an analysis of the Constitution, without citing a single authority. Its opening paragraph is an impressive example of his extraordinary power of terse and luminous statement, and his method of laying bare a fallacy by reducing it to its simplest terms." *Marshall Memorial*, II, 509, 510 (Hitchcock).

For references to Cohens' case, see McMaster, *Hist. of People of U. S.*, V, 412, 414; Miller on *Const. of U. S.* 76, 98, 317, 318; Kent, *Com.* (12th Ed.), I, 327 *et seq.*; Story, *Const. of U. S.*, I, ch. iv, §§ 373-396; *Ibid.*, III, ch. xxxviii, §§ 1701 *et seq.*; Magruder's "John Marshall," 198-201; Prof. James B. Thayer, "John Marshall," 77, 88.

"Judge Roane of the Court of Appeals of Virginia

attacked this opinion anonymously in the newspapers, with what Marshall called 'coarseness and malignity.' Jefferson, also, bitterly objected to it." Prof. James B. Thayer, "John Marshall," 88; Van Santvoord, *Lives of Chief Justices U. S.* 410, and note.

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THE NATIONAL SUPREMACY OVER FOREIGN AND INTERSTATE COMMERCE.

No more impressive example of the great and permanent influence and value of Marshall's constitutional decisions exists than in what is known as the great New York Steamboat Case, next given, reported under the name of *Gibbons v. Ogden*, decided in 1824. It is the first case that construed, in any important particular, the commerce clause of the Constitution. The doctrines of this case remain in full force until this day.

The most efficient cause of the formation of the Union under the Constitution was the selfish and conflicting regulations of the different States in respect of commerce, each trying to secure an advantage over the others, there being no power under the Articles of Confederation to regulate or control this vital subject.¹ This experience led to a provision in the Constitution² in these words: "The Congress shall have power . . . to regulate commerce with foreign nations and among the several States." This power, as respects foreign and domestic commerce, is contained in eleven words—"to regulate commerce with foreign nations and among the several States." There is, most wisely, no attempt to define what is "commerce," or what is meant by "regulation." The Steamboat Case involved the respective powers of Congress and the States over the all-important subject of commerce. It attracted the attention of the whole country.

¹ See note at end of this case in the present volume.

² Art. I, sec. 8, par. 3.

The circumstances out of which that case arose and under which the decision of Marshall was made are not only extremely interesting, but should be borne in mind as showing Marshall's judicial courage in overruling the New York view so long maintained and supported by such great names.¹

There were enacted by the State of New York five different statutes between 1798 and 1811, granting or confirming to Livingston and Fulton, or one of them, the *exclusive right of using steamboats* upon all the navigable rivers, bays and waters within the limits and jurisdiction of the State of New York for a specified term of years. One provision was that for each additional boat which could be propelled by steam with or against the current of the Hudson River, at not less than four miles an hour, they should be entitled to five years' extension to their grant, not to exceed thirty years. For such period the State granted a monopoly, under pain of forfeiture of boats and vessels owned by others which should violate the exclusive right granted to Livingston and Fulton. These acts recited that the inducement to the grant was to encourage the grantee to engage in the hazard of making expensive experiments in improving steam navigation.

In 1812 the highest court of New York, in *Livingston v. Van Ingen*,² sustained the validity of this grant, holding that it was not repugnant to the commerce clause of the Constitution of the United States, and was, at all

¹ Marshall Memorial, I, 375-379; and see references to the Marshall Memorial in the note at the end of case in the present publication. Further as to this celebrated cause see Kent, Com. (12th Ed.), I, 433 *et seq.*; Prof. James B. Thayer, "John Marshall," 88, 89; Magruder's "John Marshall," 173-175; VanSantvoord, "Lives of Chief Justices," 412.

² 9 Johnson's Reports, 507 (1812).

events, good until Congress should enact a statute which would conflict with the right granted by the State of New York.

The grounds and reasons in favor of sustaining the legislation of the State were stated by Chancellor Kent with great force. He pointed out that this legislation extended over a period of fourteen years, the first act having been passed by men familiar with the discussions which attended the adoption of the Constitution when Jay was Governor, had been approved by the Council of Revision, and the last act was passed after the State grant was drawn into question; that the States retained all powers not clearly surrendered to the General Government, including, he said, "all the internal commerce of the State by land and water; that the Hudson River is the property of the people of this State, and the Legislature had the same jurisdiction over it that they have over the land or over any of our public highways, and that the Congressional power relates to external and not to internal commerce, and is confined to a *regulation* of external commerce, and all the internal commerce of the State by land and water remains entirely, and I may say exclusively, within the scope of the original sovereignty of the State."¹ Accordingly, the defendants were absolutely enjoined, in favor of Livingston and Fulton, from navigating the Hudson with their steamboat, the "Hope," and carrying passengers on that river from New York to Albany.

Livingston, the grantee, was the celebrated chancellor and was distinguished for his eminent and patriotic services in the establishment of the Union. He had for many years been engaged in schemes of steam naviga-

¹9 Johns. 507, 572, 578.

tion, and when he was the minister of our country at Paris accidentally met Robert Fulton. An experimental boat was put upon the Seine, Livingston furnishing the funds; Fulton devised the engine and ordered it from the celebrated inventor and manufacturer, Watt. The Legislature of New York renewed the exclusive grant to Livingston and Fulton. The "Clermont," a vessel of one hundred and fifty-five tons burden, one hundred and thirty-two feet long, eighteen feet wide and seven feet deep, was launched on the East River, and departed for Albany in September, 1807, from a dock on the Hudson River, making the trip of one hundred and fifty miles in thirty-two hours. The success was complete. Other vessels were built, and the steamboat service fully and finally established. Fulton, though not the original inventor of steam navigation, is now admitted to be entitled to the honor of having been the first who successfully applied steam to navigation. Practically the "Clermont" had navigated. Under these grants and under the decision of the highest court of New York, already mentioned, made in 1812, a large amount of money had been invested in the construction of steamboats. Afterwards, 1818, in this condition of affairs, the case of Gibbons against Ogden was brought in the Court of Chancery in New York.

Chancellor Kent enjoined the defendant Ogden from running a steamboat between Elizabethtown, in New Jersey, and the City of New York, holding that the question had, after an elaborate and profound discussion, been decided in the previous case of *Livingston v. Van Ingen*. At the January term, 1820, the highest court of the State unanimously affirmed Chancellor Kent's order, holding the exclusive monopoly in the grants made by the Legis-

lature of New York to be valid, and that the Court of Chancery had the power to restrain citizens of another State from navigating the waters of New York with vessels propelled by steam, although such vessels may have been duly enrolled and licensed under the laws of the United States as coasting vessels. It was this last case that came before the Supreme Court of the United States. That court reversed the decree of the New York courts and held that the power of the General Government to regulate commerce extends to navigation in the waters throughout the entire Union, and does not stop at the external boundary of a State, and that the grants to Livingston and Fulton of an exclusive right to navigate all waters within the jurisdiction of the State of New York, by steamboats, was inoperative as against the laws of the United States regulating the coasting trade, and could not restrain vessels licensed under these laws from navigating waters within the jurisdiction of a State in the prosecution of such trade.

The cause was argued in the Supreme Court by counsel of the greatest eminence; Wirt and Webster against the constitutionality of the New York legislation; Emmet and Oakley in favor of it.¹ The opinion of the Supreme

¹ The substance of the legal points in Wirt's argument, written out by himself, may be seen in Wheaton's Reports, including a characteristic rhetorical display in the peroration, in reply to Emmet. On February 1, 1824, Wirt thus writes to his friend Judge Carr: "About to-morrow week will come on the great Steamboat question from New York. Emmet and Oakley on one side, Webster and myself on the other. Come down and hear it. Oakley is said to be one of the first logicians of the age. Webster is as ambitious as Cæsar. He will not be outdone by any man, if it is within the compass of his power to avoid it. It will be a combat worth witnessing. I have the last speech, and have yet to study the cause; but I know

Court was delivered by Chief Justice Marshall. He defined, for the first time, the meaning of the word "commerce" as used in the Constitution. He said it includes navigation. It includes trade and commerce. But he went further and said that *it was intercourse itself*. He defined also the word "regulate" in a definition which it has been justly said can never be excelled in its brevity, accuracy and comprehensiveness. To "regulate" commerce, said Marshall, is to prescribe the rule by which commerce is to be governed; and he furthermore asserted the proposition, so extensive and beneficent in its future operation, that "wherever commerce among the States

the facts, and have only to weave the argument." Kennedy, "Life of Wirt," II, 148; Van Santvoord, "Lives of the Chief Justices," 412; Irving Browne, "Short Studies of Great Lawyers," Wirt, 266-268.

Mr. Ticknor has left an interesting record of the circumstances under which Webster, then nearing the zenith of his vigor, made his argument. Mr. Ticknor's detailed account will be found at large in George Ticknor Curtis' "Life of Webster," I, 216, 217. In the midst of a speech in the House on the tariff, Mr. Webster was unexpectedly notified that *Gibbons v. Ogden* would come on the next morning. "The tapes had not been off the papers for more than a year." From ten P. M. Mr. Webster worked continuously for eleven hours until nine A. M., went into court and made his famous argument of five hours' duration, in the cause. Mr. Ticknor's account justifies Judge Story's statement in 1826 that Mr. Webster has a giant's constitution, and can bear every sort of fatigue. "Life and Letters of Story," I, 487. The substance of Webster's argument, revised by himself, occupying, however, only about twenty pages, is contained in Vol. VI of Webster's Works (Little & Brown, 1851), and in Wheaton's Reports, Vol. 9, pp. 8-33. We have found no reference to this argument in the published volumes of the "Private Correspondence of Daniel Webster," edited by Fletcher Webster, Boston, 1857.

Mr. Oakley's argument as found in Wheaton's Reports, Vol. 9, occupies from pp. 83-79, Mr. Emmet's pp. 79-159, and Mr. Wirt's pp. 159-186.

goes, the judicial power of the United States goes to protect it from invasion by State Legislatures." The same sound and liberal principles were applied by the Chief Justice respecting the right of the States to tax foreign commerce, in the case of *Brown* against Maryland.

Upon these decisions rest the navigation and interstate commerce laws and the recent anti-trust laws of the United States. The decisions of the Supreme Court and the laws regulating commerce and creating the Interstate Commerce Commission have had the effect to render the commerce of this country free from the selfishness, the trammels and the exactions to which it would have been subjected had the decision of the courts of New York in the *Steamboat Case* been affirmed by the Supreme Court of the United States.

The subsequent history of the country shows that notwithstanding the decision of the Supreme Court the different States have passed almost innumerable acts to tax and to fetter the commerce of the country in order to obtain some selfish advantage at the expense of the other States of the Union.

We owe it to Marshall and the eminent judges who sat in the court with him, that our vast foreign commerce is untrammelled, and that our interstate commerce, still vaster, on land and water, by boat or rail or telegraph, knows no State lines, is subject to no State exactions, and is as free to every one engaged in it as the elements of air and water.¹

¹ Marshall Memorial, I, 375-379 (Dillon), 488, 489 (Mitchell); II, 54 (*Justice Brown*), 82 (*McRae*), 352 (*Lindsay*), 482 (*Lehmann*), 557 (*Ladd*); III, 88 (*Rogers*).

Gibbons v. Ogden.

February Term, 1824.

[9 Wheaton's Reports, 1-240.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

The power to regulate commerce includes the power to regulate navigation, and does not stop at the external boundary of a State.

It does not comprehend that commerce which is completely internal.

The laws of New York, which grant to Livingston and Fulton the exclusive right to navigate all the waters within the jurisdiction of that State, with boats moved by steam or fire, for a term of years, are inoperative as against the laws of the United States regulating the coasting trade, and cannot restrain vessels licensed to carry on the coasting trade under the laws of the United States, from navigating those waters in the prosecution of that trade.

The necessary facts appear in the preceding statement. The following is the opinion in full of the Chief Justice: ¹

MARSHALL, Chief Justice. The appellant contends that this decree is erroneous, because the laws, which purport

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

GABRIEL DUVAL,

THOMAS TODD,

JOSEPH STORY,

SMITH THOMPSON,

} *Associate Justices.*

There was no dissent in the case, but Mr. Justice Johnson wrote

to give the exclusive privilege it sustains, are repugnant to the Constitution and laws of the United States.

Opinion.

They are said to be repugnant —

1st. To that clause in the Constitution which authorizes Congress to regulate commerce.

2d. To that which authorizes Congress to promote the progress of science and useful arts.

The State of New York maintains the constitutionality of these laws; and their Legislature, their Council of Revision, and their judges, have repeatedly concurred in this opinion. It is supported by great

Constitutionality of laws granting exclusive privilege of navigation in New York maintained by its courts.

names — by names which have all the titles to consideration that virtue, intelligence, and office can bestow. No tribunal can approach the decision of this question without feeling a just and real respect for that opinion which is sustained by such authority; but it is the province of this court, while it respects, not to bow to it implicitly; and the judges must exercise, in the examination of the subject, that understanding which Provi-

an opinion (9 Wheaton, pp. 222-239) commencing as follows: "The judgment entered by the court in this cause has my entire approbation; but having adopted my conclusions on views of the subject materially different from those of my brethren, I feel it incumbent on me to exhibit those views. I have also another inducement: In questions of great importance and great delicacy I feel my duty to the public best discharged by an effort to maintain my opinions in my own way."

Justice Thompson was appointed the 9th of December, 1823, and took his seat on the bench the 10th of February, 1824. He took no part in the decision of causes argued before that day.

Daniel Webster and Attorney-General William Wirt appeared for the appellant.

Thomas J. Oakley and Robert Emmet appeared for the respondent.

dence has bestowed upon them, with that independence which the people of the United States expect from this department of the government.

As preliminary to the very able discussions of the Constitution which we have heard from the bar, and as having some influence on its construction, reference has been made to the political situation of these States anterior to its formation. It has been said that they were sovereign, were completely independent, and were connected with each other only by a league. This is true. But when these allied sovereigns converted their league into a government, when they converted their congress of ambassadors, deputed to deliberate on their common concerns, and to recommend measures of general utility, into a Legislature, empowered to enact laws on the most interesting subjects, the whole character in which the States appear underwent a change, the extent of which must be determined by a fair consideration of the instrument by which that change was effected.

This instrument contains an enumeration of powers expressly granted by the people to their government. It has been said that these powers ought to be construed strictly. But why ought they to be so construed? Is there one sentence in the Constitution which gives countenance to this rule? In the last of the enumerated powers, that which grants expressly the means for carrying all others into execution, Congress is authorized "to make all laws which shall be necessary and proper" for the purpose. But this limitation on the means which may be used is not extended to the powers which are con-

Political situation of the States before the formation of the Constitution and afterwards.

Strict construction of powers granted by the Constitution disproved.

ferred; nor is there one sentence in the Constitution which has been pointed out by the gentlemen of the bar, or which we have been able to discern, that prescribes this rule. We do not, therefore, think ourselves justified in adopting it. What do gentlemen mean by a strict construction? If they contend only against that enlarged construction which would extend words beyond their natural and obvious import, we might question the application of the term, but should not controvert the principle. If they contend for that narrow construction which, in support of some theory not to be found in the Constitution, would deny to the government those powers which the words of the grant, as usually understood, import, and which are consistent with the general views and objects of the instrument; for that narrow construction which would cripple the government and render it unequal to the objects for which it is declared to be instituted, and to which the powers given, as fairly understood, render it competent; then we cannot perceive the propriety of this strict construction, nor adopt it as the rule by which the Constitution is to be expounded. As men whose intentions require no concealment generally employ the words which most directly and aptly express the ideas they intend to convey, the enlightened patriots who framed our Constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said. If, from the imperfection of human language, there should be serious doubts respecting the extent of any given power, it is a well settled rule that the objects for which it was given, especially when those objects are expressed in the instrument itself, should have great in-

In determining extent of any given power the courts will, if necessary, look to the objects for which it is given.

fluence in the construction. We know of no reason for excluding this rule from the present case. The grant does not convey power which might be beneficial to the grantor, if retained by himself, or which can inure solely to the benefit of the grantee, but is an investment of power for the general advantage, in the hands of agents selected for that purpose, which power can never be exercised by the people themselves, but must be placed in the hand of agents, or lie dormant. We know of no rule for construing the extent of such powers other than is given by the language of the instrument which confers them, taken in connection with the purposes for which they were conferred.

The words are, "Congress shall have power to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

The subject to be regulated is commerce; and our Constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be

"Commerce," the subject to be regulated —
Meaning of the word.

silent on the admission of the vessels of the one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals in the actual employment of buying and selling, or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense, because all have understood it in that sense; and the attempt to restrict it comes too late.

Commerce includes navigation.

If the opinion that "commerce," as the word is used in the Constitution, comprehends navigation also, requires any additional confirmation, that additional confirmation is, we think, furnished by the words of the instrument itself.

It is a rule of construction, acknowledged by all, that the exceptions from a power mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—that which the words of the grant

The exceptions from a power mark its extent.

could not comprehend. If, then, there are in the Constitution plain exceptions from the power over navigation, plain inhibitions to the exercise of that power in a particular way, it is a proof that those who made these exceptions, and prescribed these inhibitions, understood the power to which they applied as being granted.

The ninth section of the first article declares that "no preference shall be given, by any regulation of commerce or revenue, to the ports of one State over those of another." This clause cannot be understood as applicable to those laws only which are passed for the purposes of revenue, because it is expressly applied to commercial regulations; and the most obvious preference which can be given to one port over another, in regulating commerce, relates to navigation. But the subsequent part of the sentence is still more explicit. It is, "nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another." These words have a direct reference to navigation.

The universally acknowledged power of the government to impose embargoes must also be considered as showing that all America is united in that construction which comprehends navigation in the word "commerce." Gentlemen have said, in argument, that this is a branch of the war-making power, and that an embargo is an instrument of war, not a regulation of trade.

That it may be, and often is, used as an instrument of war cannot be denied. An embargo may be imposed for the purpose of facilitating the equipment or manning of a fleet, or for the purpose of concealing the progress of an expedition preparing to sail from a particular port. In these, and in similar cases, it is a military instrument,

Power to impose embargoes included in power to regulate commerce.

ment to impose embargoes must also be considered as showing that all America is united in that construction

and partakes of the nature of war. But all embargoes are not of this description. They are sometimes resorted to without a view to war, and with a single view to commerce. In such case an embargo is no more a war measure than a merchantman is a ship of war because both are vessels which navigate the ocean with sails and seamen.

When Congress imposed that embargo which, for a time, engaged the attention of every man in the United States, the avowed object of the law was the protection of commerce, and the avoiding of war. By its friends and its enemies it was treated as a commercial, not as a war, measure. The persevering earnestness and zeal with which it was opposed, in a part of our country which supposed its interests to be vitally affected by the act, cannot be forgotten. A want of acuteness in discovering objections to a measure to which they felt the most deep-rooted hostility will not be imputed to those who were arrayed in opposition to this. Yet they never suspected that navigation was no branch of trade, and was, therefore, not comprehended in the power to regulate commerce. They did, indeed, contest the constitutionality of the act, but on a principle which admits the construction for which the appellant contends. They denied that the particular law in question was made in pursuance of the Constitution, not because the power could not act directly on vessels, but because a perpetual embargo was the annihilation, and not the regulation, of commerce. In terms, they admitted the applicability of the words used in the Constitution to vessels; and that, in a case which produced a degree and extent of excitement calculated to draw forth every principle on which legitimate resistance could be sustained. No example could more

strongly illustrate the universal understanding of the American people on this subject.

The word used in the Constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce."

To what commerce does this power extend? The Constitution informs us, to commerce "with foreign nations, and among the several States, and with the Indian tribes."

The power to regulate commerce comprehends every species of commercial intercourse between the United States and foreign nations.

It has, we believe, been universally admitted that these words comprehend every species of commercial intercourse between the United States and foreign nations. No sort of trade can be carried on between this country and any other to which this power does not extend. It has been truly said that commerce, as the word is used in the Constitution, is a unit, every part of which is indicated by the term.

If this be the admitted meaning of the word in its application to foreign nations, it must carry the same meaning throughout the sentence, and remain a unit, unless there be some plain, intelligible cause which alters it.

The subject to which the power is next applied is to commerce "among the several States."

Extent of power with respect to commerce among the States.

The word "among" means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but may be introduced into the interior.

It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States. Such a power would be inconvenient, and is certainly unnecessary.

Comprehensive as the word "among" is, it may very properly be restricted to that commerce which concerns more States than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a State, because it is not an apt phrase for that purpose; and the enumeration of the particular classes of commerce to which the power was to be extended would not have been made, had the intention been to extend the power to every description. The enumeration presupposes something not enumerated; and that something, if we regard the language or the subject of the sentence, must be the exclusively internal commerce of a State. The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the Nation; and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

But in regulating commerce with foreign nations, the power of Congress does not stop at the jurisdictional lines of the several States. It would be a very useless power if it could not pass those lines. The commerce of the United

The power of Congress to regulate commerce may be exercised wherever the subject exists.

States with foreign nations is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right. If Congress has the power to regulate it, that power must be exercised wherever the subject exists. If it exists within the States, if a foreign voyage may commence or terminate at a port within a State, then the power of Congress may be exercised within a State.

This principle is, if possible, still more clear, when applied to commerce "among the several States." They either join each other, in which case they are separated by a mathematical line, or they are remote from each other, in which case other States lie between them. What is commerce "among" them? and how is it to be conducted? Can a trading expedition between two adjoining States commence and terminate outside of each? And if the trading intercourse be between two States remote from each other, must it not commence in one, terminate in the other, and, probably, pass through a third? Commerce among the States must, of necessity, be commerce with the States. In the regulation of trade with the Indian tribes, the action of the law, especially when the Constitution was made, was chiefly within a State. The power of Congress, then, whatever it may be, must be exercised within the territorial jurisdiction of the several States. The sense of the Nation on this subject is unequivocally manifested by the provisions made in the laws for transporting goods by land between Baltimore and Providence, between New York and Philadelphia, and between Philadelphia and Baltimore.

We are now arrived at the inquiry, What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed.¹

This power, like all others vested in Congress, is complete in itself, may be

Power to regulate commerce vested absolutely in Congress.

exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its Constitution the same restrictions on the exercise of the power as are found in the Constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.

The power of Congress, then, comprehends navigation within the limits of every State in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several States, or with the Indian tribes." It

Power of Congress to regulate commerce comprehends navigation within the limits of every State in the Union.

¹ "We have, in *Gibbons v. Ogden*, that magazine of constitutional law upon this subject, a definition by Chief Justice Marshall of what it is to regulate commerce, which perhaps can never be excelled in its brevity, accuracy and comprehensiveness." Miller, Const. of U. S. 449.

may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies.

But it has been urged with great earnestness, that, although the power of Congress to regulate commerce with foreign nations, and among the several States, be

The States excluded from the exercise of such power.

co-extensive with the subject itself, and have no other limits than are prescribed in the Constitution, yet the States may severally exercise the same power within their respective jurisdictions. In support of this argument it is said that they possessed it, as an inseparable attribute of sovereignty, before the formation of the Constitution, and still retain it, except so far as they have surrendered it by that instrument; that this principle results from the nature of the government, and is secured by the Tenth Amendment, that an affirmative grant of power is not exclusive, unless in its own nature it be such that the continued exercise of it by the former possessor is inconsistent with the grant, and that this is not of that description.

The appellant, conceding these postulates, except the last, contends that full power to regulate a particular subject implies the whole power, and leaves no residuum; that a grant of the whole is incompatible with the existence of a right in another to any part of it.

Both parties have appealed to the Constitution, to legislative acts, and judicial decisions; and have drawn arguments from all these sources to support and illustrate the propositions they respectively maintain.

The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been

No analogy between power of taxation and power of regulating commerce.

drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, etc., to pay the debts, and provide for the common defense and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is au-

thorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

In discussing the question whether this power is still
A State cannot regulate commerce while Congress is regulating it. in the States, in the case under consideration, we may dismiss from it the inquiry whether it is surrendered by the mere grant to Congress, or is retained until Congress shall exercise the power. We may dismiss that inquiry because it has been exercised, and the regulations which Congress deemed it proper to make are now in full operation. The sole question is, Can a State regulate commerce with foreign nations and among the States while Congress is regulating it?

The counsel for the respondent answer this question in the affirmative, and rely very much on the restrictions in the tenth section, as supporting their opinion. They say, very truly, that limitations of a power furnish a strong argument in favor of the existence of that power; and that the section which prohibits the States from laying duties on imports or exports proves that this power might have been exercised, had it not been expressly forbidden; and, consequently, that any other commercial regulation, not expressly forbidden, to which the original power of the State was competent, may still be made.

That this restriction shows the opinion of the convention that a State might impose duties on exports and imports, if not expressly forbidden, will be conceded; but that it follows, as a consequence, from this concession, that a State may regulate commerce with foreign nations and among the States, cannot be admitted.

We must first determine whether the act of laying "duties or imposts on imports or exports" is considered in the Constitution as a branch of the taxing power, or

of the power to regulate commerce. We think it very clear that it is considered as a branch of the taxing power. It is so treated in the first clause of the eighth section: "Congress shall have power to lay and collect taxes, duties, imposts, and excises;" and before commerce is mentioned, the rule by which the exercise of this power must be governed is declared. It is, that all duties, imposts, and excises shall be uniform. In a separate clause of the enumeration the power to regulate commerce is given, as being entirely distinct from the right to levy taxes and imposts, and as being a new power not before conferred. The Constitution, then, considers these powers as substantive, and distinct from each other; and so places them in the enumeration it contains. The power of imposing duties on imports is classed with the power to levy taxes, and that seems to be its natural place. But the power to levy taxes could never be considered as abridging the right of the States on that subject; and they might, consequently, have exercised it by levying duties on imports or exports, had the Constitution contained no prohibition on this subject. This prohibition, then, is an exception from the acknowledged power of the States to levy taxes, not from the questionable power to regulate commerce.

The power of imposing duties on imports and exports is a branch of the taxing power.

"A duty of tonnage" is as much a tax as a duty on imports or exports; and the reason which induced the prohibition of those taxes extends to this also. This tax may be imposed by a State, with the consent of Congress; and it may be admitted that Congress cannot give a right to a State, in virtue of its own powers. But a duty of tonnage being part of the power of imposing taxes, its pro-

A duty of tonnage is part of power of imposing taxes.

hibition may certainly be made to depend on Congress, without affording any implication respecting a power to regulate commerce. It is true that duties may often be, and in fact often are, imposed on tonnage, with a view to the regulation of commerce; but they may be also imposed with a view to revenue; and it was, therefore, a prudent precaution to prohibit the States from exercising this power. The idea that the same measure might, according to circumstances, be arranged with different classes of power, was no novelty to the framers of our Constitution. Those illustrious statesmen and patriots had been, many of them, deeply engaged in the discussions which preceded the war of our Revolution, and all of them were well read in those discussions. The right to regulate commerce, even by the imposition of duties, was not controverted; but the right to impose a duty for the purpose of revenue produced a war as important, perhaps, in its consequences to the human race, as any the world has ever witnessed.

The States prohibited from exercise of this power by the Constitution.

These restrictions, then, are on the taxing power, not on that to regulate commerce; and presuppose the existence of that which they restrain, not of that which they do not purport to restrain.

But the inspection laws are said to be regulations of commerce, and are certainly recognized in the Constitution as being passed in the exercise of a power remaining with the States.

That inspection laws may have a remote and considerable influence on commerce will not be denied; but that a power to regulate commerce is the source from which the right to pass them is derived cannot be admitted. The object of inspection laws is to improve the

quality of articles produced by the labor of a country; to fit them for exportation; or, it may be, for domestic use. They act upon the subject before it becomes an article of foreign commerce, or of commerce among the States, and prepare it for that purpose. They form a portion of that immense mass of legislation which embraces everything within the territory of a State not surrendered to the General Government; all which can be most advantageously exercised by the States themselves. Inspection laws, quarantine laws, health laws of every description, as well as laws for regulating the internal commerce of a State, and those which respect turnpike roads, ferries, etc., are component parts of this mass.

Inspection laws act upon the subject before it becomes an article of foreign or interstate commerce.

No direct general power over these objects is granted to Congress; and consequently they remain subject to State legislation. If the legislative power of the Union can reach them, it must be for National

Power with respect to inspection, quarantine, health laws, etc., remains subject to State legislation.

purposes; it must be where the power is expressly given for a special purpose, or is clearly incidental to some power which is expressly given. It is obvious that the government of the Union, in the exercise of its express powers, that, for example, of regulating commerce with foreign nations and among the States, may use means that may also be employed by a State in the exercise of its acknowledged powers; that, for example, of regulating commerce within the State. If Congress license vessels to sail from one port to another in the same State, the act is supposed to be necessarily incidental to the power expressly granted to Congress, and implies no claim of a direct

Power of Congress over such objects.

power to regulate the purely internal commerce of a State, or to act directly on its system of police. So, if a State, in passing laws on subjects acknowledged to be within its control, and with a view to those subjects, shall adopt a measure of the same character with one which Congress may adopt, it does not derive its authority from the particular power which has been granted, but from some other which remains with the State, and may be executed by the same means. All experience shows that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical. Although the means used in their execution may sometimes approach each other so nearly as to be confounded, there are other situations in which they are sufficiently distinct to establish their individuality.

In our complex system, presenting the rare and difficult scheme of one general government, whose action extends over the whole, but which possesses only certain enumerated powers, and of numerous State governments, which retain and exercise all powers not delegated to the Union, contests respecting power must arise. Were it even otherwise, the measures taken by the respective governments to execute their acknowledged powers would often be of the same description, and might sometimes interfere. This, however, does not prove that the one is exercising, or has a right to exercise, the powers of the other.

The acts of Congress, passed in 1796 and 1799,¹ empowering and directing the officers of the General Govern-

Contests respecting power will necessarily arise under our complex system of government.

¹ 2 U. S. Laws, p. 545; 3 U. S. Laws, p. 126.

ment to conform to and assist in the execution of the quarantine and health laws of a State, proceed, it is said, upon the idea that these laws are constitutional. It is undoubtedly true that they do proceed

Congress may control State laws so far as may be necessary for the regulation of commerce.

upon that idea; and the constitutionality of such laws has never, so far as we are informed, been denied. But they do not imply an acknowledgment that a State may rightfully regulate commerce with foreign nations, or among the States; for they do not imply that such laws are an exercise of that power, or enacted with a view to it. On the contrary, they are treated as quarantine and health laws, are so denominated in the acts of Congress, and are considered as flowing from the acknowledged power of a State to provide for the health of its citizens. But as it was apparent that some of the provisions made for this purpose, and in virtue of this power, might interfere with, and be affected by, the laws of the United States made for the regulation of commerce, Congress, in that spirit of harmony and conciliation which ought always to characterize the conduct of governments standing in the relation which that of the Union and those of the States bear to each other, has directed its officers to aid in the execution of these laws; and has, in some measure, adapted its own legislation to this object, by making provisions in aid of those of the States. But in making these provisions the opinion is unequivocally manifested that Congress may control the State laws, so far as it may be necessary to control them for the regulation of commerce.

The act passed in 1803,¹ prohibiting the importation of slaves into any State which shall itself prohibit their im-

¹ 3 U. S. Laws, p. 539.

portation, implies, it is said, an admission that the States possessed the power to exclude or admit them; from which it is inferred that they possess the same power with respect to other articles.

Power with respect to importation of slaves into the States does not admit the possession of any similar power.

If this inference were correct, if this power was exercised not under any particular clause in the Constitution, but in virtue of a general right over the subject of commerce, to exist as long as the Constitution itself, it might now be exercised. Any State might now import African slaves into its own territory. But it is obvious that the power of the States over this subject previous to the year 1808 constitutes an exception to the power of Congress to regulate commerce, and the exception is expressed in such words as to manifest clearly the intention to continue the pre-existing right of the States to admit or exclude, for a limited period. The words are, "The migration or importation of such persons as any of the States, now existing, *shall* think proper to admit, shall not be prohibited by the Congress prior to the year 1808." The whole object of the exception is to preserve the power to those States which might be disposed to exercise it; and its language seems to the court to convey this idea unequivocally. The possession of this particular power, then, during the time limited in the Constitution, cannot be admitted to prove the possession of any other similar power.

It has been said that the act of August 7, 1789, acknowledges a concurrent power in the States to regulate the conduct of pilots, and hence is inferred an admission of their concurrent right with Congress to regulate commerce with foreign nations, and amongst the States.

So with respect to acknowledgment of concurrent power to regulate conduct of pilots.

But this inference is not, we think, justified by the fact.

Although Congress cannot enable a State to legislate, Congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act which has been mentioned adopts this system, and gives it the same validity as if its provisions had been specially made by Congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future presupposes the right in the maker to legislate on the subject.

The act unquestionably manifests an intention to leave this subject entirely to the States, until Congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by Congress. But this section is confined to pilots within the "bays, inlets, rivers, harbors and ports of the United States," which are, of course, in whole or in part, also within the limits of some particular State. The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject, to a considerable extent; and the adoption of its system by Congress, and the application of it to the whole subject of commerce, does not seem to the court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary, being only "until further legislative provision shall be made by Congress," shows, conclusively, an opinion that Congress could con-

trol the whole subject, and might adopt the system of the States, or provide one of its own.

A State, it is said, or even a private citizen, may construct light-houses. But gentlemen must be aware that, if this proves a power in a State to regulate commerce, it proves that the same power is in the citizen. States, or individuals, who own lands, may, if not forbidden by law, erect on those lands what buildings they please; but this power is entirely distinct from that of regulating commerce, and may, we presume, be restrained, if exercised so as to produce a public mischief.

Power to erect light-houses entirely distinct from that of regulating commerce.

These acts were cited at the bar for the purpose of showing an opinion in Congress that the States possess, concurrently with the Legislature of the Union, the power to regulate commerce with foreign nations and among the States. Upon reviewing them, we think they do not establish the proposition they were intended to prove. They show the opinion that the States retain powers enabling them to pass the laws to which allusion has been made, not that those laws proceed from the particular power which has been delegated to Congress.

Acts cited fail to establish concurrent power in the States to regulate commerce.

It has been contended by the counsel for the appellant, that, as the word "to regulate" implies in its nature full power over the thing to be regulated, it excludes, necessarily, the action of all others that would perform the same operation on the same thing. That regulation is designed for the entire result, applying to those parts which remain as they were, as well as to those which are altered. It produces a uniform whole, which is as much disturbed and deranged by changing what the

The term "to regulate" implies full power over the thing to be regulated.

implies in its nature full power over the thing to be regulated, it excludes,

regulating power designs to leave untouched as that on which it has operated.

There is great force in this argument, and the court is not satisfied that it has been refuted.

Since, however, in exercising the power of regulating their own purely internal affairs, whether of trading or police, the States may sometimes enact laws the validity of which depends on their interfering with, and being contrary to, an act of Congress passed in pursuance of the Constitution, the court will enter upon the inquiry, whether the laws of New York, as expounded by the highest tribunal of that State, have, in their application to this case, come into collision with an act of Congress, and deprived a citizen of a right to which that act entitles him. Should this collision exist, it will be immaterial whether those laws were passed in virtue of a concurrent power "to regulate commerce with foreign nations and among the several States," or in virtue of a power to regulate their domestic trade and police. In one case and the other the acts of New York must yield to the law of Congress; and the decision, sustaining the privilege they confer against a right given by a law of the Union, must be erroneous.

Acts of State Legislature must yield to the law of Congress.

This opinion has been frequently expressed in this court, and is founded as well on the nature of the government as on the words of the Constitution. In argument, however, it has been contended that, if a law passed by a State in the exercise of its acknowledged sovereignty, comes into conflict with a law passed by Congress in pursuance of the Constitution, they affect the subject, and each other, like equal opposing powers.

But the framers of our Constitution foresaw this state of things, and provided for it by declaring the supremacy not only of itself, but of the laws made in pursuance of it. The nullity of any act inconsistent with the Constitution is produced by the declaration that the Constitution is the supreme law. The appropriate application of that part of the clause which confers the same supremacy on laws and treaties is to such acts of the State Legislatures as do not transcend their powers, but, though enacted in the execution of acknowledged State powers, interfere with, or are contrary to, the laws of Congress made in pursuance of the Constitution, or some treaty made under the authority of the United States. In every such case the act of Congress, or treaty, is supreme; and the law of the State, though enacted in the exercise of powers not controverted, must yield to it.

Supremacy of the Constitution and laws and treaties made in pursuance of it.

In pursuing this inquiry at the bar, it has been said that the Constitution does not confer the right of intercourse between State and State. That right derives its source from those laws whose authority is acknowledged by civilized man throughout the world: This is true. The Constitution found it an existing right, and gave to Congress the power to regulate it. In the exercise of this power Congress has passed "An act for enrolling or licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same." The counsel for the respondent contend that this act does not give the right to sail from port to port, but confines itself to regulating a pre-existing right, so far only as to confer certain privileges on enrolled and licensed vessels in its exercise.

Act for regulating the coasting trade examined in detail.

that the Constitution does not confer the right of intercourse between State

It will at once occur, that, when a Legislature attaches certain privileges and exemptions to the exercise of a right over which its control is absolute, the law must imply a power to exercise the right. The privileges are gone if the right itself be annihilated. It would be contrary to all reason, and to the course of human affairs, to say that a State is unable to strip a vessel of the particular privileges attendant on the exercise of a right, and yet may annul the right itself; that the State of New York cannot prevent an enrolled and licensed vessel, proceeding from Elizabethtown, in New Jersey, to New York, from enjoying in her course, and on her entrance into port, all the privileges conferred by the act of Congress; but can shut her up in her own port, and prohibit altogether her entering the waters and ports of another State. To the court it seems very clear that the whole act on the subject of the coasting trade, according to those principles which govern the construction of statutes, implies, unequivocally, an authority to licensed vessels to carry on the coasting trade.

But we will proceed briefly to notice those sections which bear more directly on the subject.

The first section declares that vessels enrolled by virtue of a previous law, and certain other vessels enrolled as described in First section of the act. that act, and having a license in force, as is by the act required, "and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade."

This section seems to the court to contain a positive enactment that the vessels it describes shall be entitled to the privileges of ships or vessels employed in the coasting trade. These privileges cannot be separated

from the trade, and cannot be enjoyed, unless the trade may be prosecuted. The grant of the privilege is an idle, empty form, conveying nothing, unless it convey the right to which the privilege is attached, and in the exercise of which its whole value consists. To construe these words otherwise than as entitling the ships or vessels described to carry on the coasting trade would be, we think, to disregard the apparent intent of the act.

The fourth section directs the proper officer to grant
Fourth section of the act. to a vessel qualified to receive it "a license for carrying on the coasting trade," and prescribes its form. After reciting the compliance of the applicant with the previous requisites of the law, the operative words of the instrument are, "license is hereby granted for the said steamboat, Bellona, to be employed in carrying on the coasting trade for one year from the date hereof, and no longer."

These are not the words of the officer; they are the words of the Legislature, and convey as explicitly the authority the act intended to give, and operate as effectually, as if they had been inserted in any other part of the act than in the license itself.

The word "license" means permission or authority; and a license to do any particular thing
Meaning of "license" and extent of right transferred thereby. is a permission or authority to do that thing; and if granted by a person having power to grant it, transfers to the grantee the right to do whatever it purports to authorize. It certainly transfers to him all the right, which the grantor can transfer, to do what is within the terms of the license.

Would the validity or effect of such an instrument be questioned by the respondent, if executed by persons claiming regularly under the laws of New York?

The license must be understood to be, what it purports to be, a legislative authority to the steamboat *Bellona* "to be employed in carrying on the coasting trade for one year from this date."

It has been denied that these words authorize a voyage from New Jersey to New York. It is true that no ports are specified; but it is equally true that the words used are perfectly intelligible, and do confer such authority as unquestionably as if the ports had been mentioned. The coasting trade is a term well understood. The law has defined it; and all know its meaning perfectly. The act describes, with great minuteness, the various operations of a vessel engaged in it; and it cannot, we think, be doubted that a voyage from New Jersey to New York is one of those operations.

Notwithstanding the decided language of the license, it has also been maintained that it gives no right to trade; and that its sole purpose is to confer the American character.

Purpose of license to authorize vessels to carry on coasting trade.

The answer given to this argument, that the American character is conferred by the enrolment, and not by the license, is, we think, founded too clearly in the words of the law to require the support of any additional observations. The enrolment of vessels designed for the coasting trade corresponds precisely with the registration of vessels designed for the foreign trade, and requires every circumstance which can constitute the American character. The license can be granted only to vessels already enrolled, if they be of the burden of twenty tons and upwards; and requires no circumstance essential to the American character.

The object of the license, then, cannot be to ascertain

the character of the vessel, but to do what it professes to do,— that is, to give permission to a vessel, already proved by her enrolment to be American, to carry on the coasting trade.

But if the license be a permit to carry on the coasting trade, the respondent denies that these boats were engaged in that trade, or that the decree under consideration has restrained them from prosecuting it. The boats of the appellant were, we are told, employed in the transportation of passengers; and this is no part of that commerce which Congress may regulate.

If, as our whole course of legislation on this subject shows, the power of Congress has been universally understood in America to comprehend navigation, it is a very persuasive, if not a conclusive, argument to prove that the construction is correct; and if it be correct, no clear distinction is perceived between the power to regulate vessels employed in transporting men for hire and property for hire. The subject is transferred to Congress, and no exception to the grant can be admitted which is not proved by the words or the nature of the thing. A coasting vessel employed in the transportation of passengers is as much a portion of the American marine as one employed in the transportation of a cargo, and no reason is perceived why such vessel should be withdrawn from the regulating power of that government which has been thought best fitted for the purpose generally. The provisions of the law respecting native seamen, and respecting ownership, are as applicable to vessels carrying men as to vessels carrying manufactures; and no reason is perceived why the power over the subject should not

No distinction between vessels employed in transportation of passengers and those employed in transportation of property.

be placed in the same hands. The argument urged at the bar rests on the foundation that the power of Congress does not extend to navigation as a branch of commerce, and can only be applied to that subject incidentally and occasionally. But if that foundation be removed, we must show some plain, intelligible distinction, supported by the Constitution or by reason, for discriminating between the power of Congress over vessels employed in navigating the same seas. We can perceive no such distinction.

If we refer to the Constitution, the inference to be drawn from it is rather against the distinction. The section which restrains Congress from prohibiting the migration or importation of such persons as any of the States may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary as importation does to involuntary arrivals; and so far as an exception from a power proves its existence, this section proves that the power to regulate commerce applies equally to the regulation of vessels employed in transporting men who pass from place to place voluntarily, and to those who pass involuntarily.

If the power reside in Congress, as a portion of the general grant to regulate commerce, then acts applying that power to vessels generally must be construed as comprehending all vessels. If none appear to be excluded by the language of the act, none can be excluded by construction. Vessels have always been employed, to a greater or less extent, in the transportation of passengers, and have never been supposed to be, on that account,

withdrawn from the control or protection of Congress. Packets which ply along the coast as well as those which make voyages between Europe and America consider the transportation of passengers as an important part of their business. Yet it has never been suspected that the general laws of navigation did not apply to them.

The duty act, sections twenty-three and forty-six, contains provisions respecting passengers, and shows that vessels which transport them have the same rights, and must perform the same duties, with other vessels. They are governed by the general laws of navigation.

In the progress of things this seems to have grown into a particular employment, and to have attracted the particular attention of government. Congress was no longer satisfied with comprehending vessels engaged specially in this business within those provisions which were intended for vessels generally; and on the 2d of March, 1819, passed "An act regulating passenger ships and vessels." This wise and humane law provides for the safety and comfort of passengers, and for the communication of everything concerning them, which may interest the government, to the Department of State; but makes no provision concerning the entry of the vessel, or her conduct in the waters of the United States. This, we think, shows conclusively the sense of Congress (if, indeed, any evidence to that point could be required) that the pre-existing regulations comprehended passenger ships among others; and in prescribing the same duties the Legislature must have considered them as possessing the same rights.

If, then, it were even true that the Bellona and the

Act of March 2, 1819, for
"regulating passenger
ships and vessels."

Stoudinger were employed exclusively in the conveyance of passengers between New York and New Jersey, it would not follow that this occupation did not constitute a part of the coasting trade of the United States, and was not protected by the license annexed to the answer. But we cannot perceive how the occupation of these vessels can be drawn into question in the case before the court. The laws of New York, which grant the exclusive privilege set up by the respondent, take no notice of the employment of vessels, and relate only to the principle by which they are propelled. Those laws do not inquire whether vessels are engaged in transporting men or merchandise, but whether they are moved by steam or wind. If by the former, the waters of New York are closed against them, though their cargoes be dutiable goods, which the laws of the United States permit them to enter and deliver in New York. If by the latter, those waters are free to them, though they should carry passengers only. In conformity with the law is the bill of the plaintiff in the State court. The bill does not complain that the *Bellona* and the *Stoudinger* carry passengers, but that they are moved by steam. This is the injury of which he complains, and is the sole injury against the continuance of which he asks relief. The bill does not even allege, specially, that those vessels were employed in the transportation of passengers, but says, generally, that they were employed "in the transportation of passengers or otherwise." The answer avers only that they were employed in the coasting trade, and insists on the right to carry on any trade authorized by the license. No testimony is taken, and the writ of injunction and decree restrain these licensed ves-

The laws of New York granting the exclusive privilege related to the method of propulsion and not to the character of employment of vessels.

sels not from carrying passengers, but from being moved through the waters of New York by steam for any purpose whatever.

The questions, then, whether the conveyance of passengers be a part of the coasting trade, and whether a vessel can be protected in that occupation by a coasting license, are not, and cannot be, raised in this case. The real and sole question seems to be whether a steam machine, in actual use, deprives a vessel of the privileges conferred by a license.

In considering this question, the first idea which presents itself is that the laws of Congress for the regulation of commerce do not look to the principle by which vessels are moved. That subject is left entirely to individual discretion, and in that vast and complex system of legislative enactment concerning it, which embraces everything that the Legislature thought it necessary to notice, there is not, we believe, one word respecting the peculiar principle by which vessels are propelled through the water, except what may be found in a single act granting a particular privilege to steamboats. With this exception, every act, either prescribing duties, or granting privileges, applies to every vessel, whether navigated by the instrumentality of wind or fire, of sails or machinery. The whole weight of proof, then, is thrown upon him who would introduce a distinction to which the words of the law give no countenance.

The act of Congress regulating commerce applies to all vessels however propelled.

If a real difference could be admitted to exist between vessels carrying passengers and others, it has already been observed that there is no fact in this case which can bring up that question. And if the occupation of steamboats be a matter of such general notoriety that

the court may be presumed to know it, although not specially informed by the record, then we deny that the transportation of passengers is their exclusive occupation. It is a matter of general history that in our western waters their principal employment is the transportation of merchandise; and all know that in the waters of the Atlantic they are frequently so employed.

But all inquiry into this subject seems to the court to be put completely at rest by the act already mentioned, entitled "An act for the enrolment and licensing of steamboats."

This act authorizes a steamboat employed, or intended to be employed, only in a river or bay Act "for the enrolment and licensing of steamboats" cited. of the United States, owned wholly or in part by an alien, resident within the United States, to be enrolled and licensed as if the same belonged to a citizen of the United States.

This act demonstrates the opinion of Congress that steamboats may be enrolled and licensed, in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating waters and entering ports which are free to such vessels than if they were wafted on their voyage by the winds, instead of being propelled by the agency of fire. The one element may be as legitimately used as the other, for every commercial purpose authorized by the laws of the Union; and the act of a State, inhibiting the use of either to any vessel having a license under the act of Congress, comes, we think, in direct collision with that act.

As this decides the cause, it is unnecessary to enter on an examination of that part of the Constitution which empowers Congress to promote the progress of science and the useful arts.

The court is aware that, in stating the train of reasoning by which we have been conducted to this result, much time has been consumed in the attempt to demonstrate propositions which may have been thought axioms. It is felt that the tediousness inseparable from the endeavor to prove that which is already clear is imputable to a considerable part of this opinion. But it was unavoidable. The conclusion to which we have come depends on a chain of principles which it was necessary to preserve unbroken; and although some of them were thought nearly self-evident, the magnitude of the question, the weight of character belonging to those from whose judgment we dissent, and the argument at the bar, demanded that we should assume nothing.

Powerful and ingenious minds, taking, as postulates, that the powers expressly granted to the government of the Union are to be contracted, by construction, into the narrowest possible compass, and that the original powers of the States are retained, if any possible construction will retain them, may, by a course of well digested, but refined and metaphysical reasoning, founded on these premises, explain away the Constitution of our country, and leave it, a magnificent structure, indeed, to look at, but totally unfit for use. They may so entangle and perplex the understanding as to obscure principles which were before thought quite plain, and induce doubts where, if the mind were to pursue its own course, none would be perceived. In such a case it is peculiarly necessary to recur to safe and fundamental principles to sustain those principles, and, when sustained, to make them the tests of the arguments to be examined.

A strict and narrow construction of the Constitution disapproved.

Accordingly the decree of the State court was reversed, and the Supreme Court itself entered a decree dismissing Ogden's bill of complaint.¹

NOTE

Speaking of the commerce clause of the Constitution Story says: "The want of this power was one of the leading defects of the Confederation, and probably, as much as any one cause, conduced to the establishment of the Constitution." *Com. Const.*, II, ch. xv, § 1053. So, Hamilton, *Federalist* No. 22: "In addition to the defects of the existing Federal system enumerated in the last number, there are others of not less importance, which concur in rendering that system altogether unfit for the administration of the affairs of the Union. The want of a power to regulate commerce is by all parties allowed to be of this number. . . . It is indeed evident, on the most superficial view, that there is no object, either as it respects the interest of trade or finance, that more strongly demands a Federal superintendence." See Webster's Works, VI, 10, argument in *Gibbons v. Ogden*. Also in 9 Wheaton, pp. 12, 13.

Mr. Justice Miller's opinion of the vital importance of the commerce clause is very emphatic:

"The trade between the States was heavily taxed in pursuance of a policy by which each endeavored to lay the burden of raising its revenues upon the others. This has been one of the most difficult things to correct, and efforts in that direction have been made against the attempts to accomplish this object, which have been persistently pursued up to the present time.² Many cases

¹ Form of decree, 9 Wheaton, 239, 240.

² See Miller, *Const. of U. S.* 80. The learned author here refers to the following instances of State legislation in contravention of the commerce clause of the Constitution:

Statute of New York granting exclusive navigation of waters within the State. *Gibbons v. Ogden*, 9 Wheat. 1.

Statute of Maryland requiring license to sell imported goods. *Brown v. Maryland*, 12 Wheat. 419; *Ward v. Maryland*, 12 Wall. 418.

Statute of Missouri requiring a like license. *Welton v. Missouri*, 91 U. S. 275.

Statute of California imposing a tax on bills of lading for gold or silver carried out of the State. *Almy v. California*, 24 How. 169.

have come before the Supreme Court of the United States involving this question where State laws of this character have been held to be invalid because in conflict with the constitutional power of Congress alone to regulate commerce of that nature. Notwithstanding for nearly one hundred years we have had in the Federal Constitution the declaration that Congress shall have power to regulate commerce among the several States, there are at this hour upon the statute books of almost every State,

Statute of Alabama providing for the registration of the names of steamboat owners. *Sinnot v. Davenport*, 22 How. 227.

Statutes of New York and Massachusetts imposing taxes on alien passengers arriving in ports of those States. *Passenger Cases*, 7 How. 283; *Henderson v. Mayor of New York*, 92 U. S. 259.

Statute of California imposing like taxes. *Chy Lung v. Freeman*, 93 U. S. 275.

Statute of New York taxing banks. *Bank of Commerce v. New York City*, 2 Black, 620; *Bank Tax Case*, 2 Wall. 200.

Statute of Nevada levying a capitation tax upon passengers carried out of the State. *Crandall v. Nevada*, 6 Wall. 35.

Statute of Pennsylvania imposing tax upon articles brought into or carried out of the State. *Case of State Freight Tax*, 15 Wall. 232; *Philadelphia Steamship Co. v. Pennsylvania*, 122 U. S. 326.

Statute of Tennessee imposing a license or privilege tax on sleeping-cars. *Pickard v. Pullman Southern Car Co.*, 117 U. S. 34; *Tennessee v. Same*, 117 U. S. 51.

Statute of Louisiana imposing a license tax on boats. *Moran v. New Orleans*, 112 U. S. 69.

Statutes regulating delivery of telegraphic dispatches in other States. *Western Union Telegraph Co. v. Pendleton*, 122 U. S. 347; *Telegraph Co. v. Texas*, 105 U. S. 460.

Statute of Missouri prohibiting bringing certain cattle into the State. *Railroad Co. v. Husen*, 95 U. S. 465.

Statute of Louisiana regulating transportation of passengers, without distinction of race or color. *Hall v. De Cuir*, 95 U. S. 485.

Statute of Tennessee taxing drummers. *Robbins v. Shelby County Taxing District*, 120 U. S. 439. [Cases reviewed.]

Statute of Illinois regulating rates of railroad transportation. *Wabash & St. Louis Railway Co. v. Illinois*, 118 U. S. 557. [Cases reviewed.]

The more than one hundred and twenty-five cases in the Supreme Court of the United States decided since *Gibbons v. Ogden*, construing and applying the commerce clause of the Constitution, down to 1898, are carefully collected and chronologically arranged in Mr. William D. Guthrie's learned and valuable *Lectures on the Fourteenth Amendment*, pp. 186, 187, note. (Little, Brown & Co., 1898.) The doctrines of the Supreme Court as to the "Limitations on the Police Power [of the States] arising from the Federal Power over Commerce" is clearly and ably summarized and commented on by Mr. Alfred Russell in his valuable monograph on "The Police Power of the State." (Chicago, Callaghan & Co., 1900.)

laws violating that provision; and there is no doubt that if that clause were removed to-morrow, this Union would fall to pieces, simply by reason of the struggles of each State to make the property owned in other States pay its expenses. It was this tendency of each State to support its government out of taxes levied upon the property of other States or on the produce or merchandise which must go through one State to another, that more than any other one thing compelled the formation of the present Constitution."¹

It is under the commerce clause that what is known as the Interstate Commerce Act was passed and the Interstate Commerce Commission was created. This act regulates the duties of railway and other common carriers engaged in interstate commerce, and is intended to protect the freedom of commerce which the Constitution designed to secure.² The more recent anti-trust legislation of Congress rests upon the same or like basis and is intended to effect the same great purpose.³

"The power to regulate commerce is not at all like that to lay taxes. The latter may be concurrent, while the former is exclusive, resulting from the different nature of the two powers." Story, Com. Const., II, ch. xv, § 1064; see also on this point Justice Story in *New York v. Miln*, 11 Pet. 102; *The Passenger Cases*, 7 How. 502; *Head-Money Cases*, 112 U. S. 595.

"In regulating commerce, therefore, Congress regulates traffic in things, vehicles of transport and things *in transitu*, but not the things themselves. Before and after the *transitus* they are beyond this power of regulation. The production and use of things in the *terminus a quo* and the *terminus ad quem* are not subjects of the commercial power, but of the law of the State or country from which and to which they are transported." Tucker, Const. of U. S., II, 526, and cases cited.

The boundaries between the power of Congress and

¹ Miller, Const. of U. S. 81, 82.

² The Supreme Court of the United States has declared this act constitutional in many cases. See *Interstate Commerce Commission v. B. & O. Ry. Co.*, 145 U. S. 263; *United States v. Joint Traffic Association*, 175 Id. 505.

³ *United States v. Swift & Co.* (U. S. Circuit Court, Illinois, before Grosscup, Circuit Judge, 1903), 122 Federal Reporter, 529.

the power of the States over the subject of "commerce among the States" cannot be said to be fully defined notwithstanding the many cases on the subject that have been decided by the Supreme Court. Marshall's language in the above opinion concedes the power of the States over what he variously styles "the *exclusively* internal commerce of a State," "the *completely* internal commerce of a State," etc. But what constitutes such exclusive or complete internal commerce, while plain enough in general, becomes difficult of determination in specific cases, as is shown in the now pending so-called anti-trust litigation. On this subject the Constitution is undergoing judicial development and is destined from the nature of the case to do so for an indefinite, perhaps never-ending period. In the course of this development our experience, as we venture to predict, will show the wonderful sagacity and prevision of Marshall in so carefully using the qualifying words "*exclusively*," "*completely*" internal as defining the commerce over which the power of the States is free from Congressional regulation.¹

REFERENCES TO GIBBONS v. OGDEN, IN MARSHALL MEMORIAL

VOL. I

Justice Horace Gray, pp. 70, 93; Hon. Charles Freeman Libby, p. 127; Prof. Jeremiah Smith, p. 152; Hon. Henry St. George Tucker, p. 251; Judge Le Baron Colt, pp. 300, 302; Hon. John F. Dillon, pp. 375 *et seq.*; Hon. W. Bourke Cockran, p. 418; Justice James T. Mitchell, pp. 488, 489; Hon. John Bassett Moore, pp. 518, 519.

VOL. II

Charles J. Bonaparte, Esq., p. 16; Justice Henry B. Brown, p. 54; Judge James C. MacRae, p. 82; Hon. H. Warner Hill, p. 118; Judge Horace H. Lurton, p. 204; Judge Waller C. Caldwell, p. 215; Justice John A. Shauck, p. 232; Hampton L. Carson, Esq., p. 261; Hon. John F. Follett, p. 276; Hon. William A. Ketcham, pp. 293, 294; Hon. Henry

¹ One of the most important cases on this subject is *Wabash R. R. Co. v. Illinois*, 118 U. S. 557. Among the latest cases are *Western Union Telegraph Co. v. New Hope*, 187 U. S. 419, and *Atlantic & Pacific Tel. Co. v. Philadelphia*, 190 U. S. 160, decided at the October term, 1902.

Cabot Lodge, p. 381; Hon. William Lindsay, pp. 352, 353, 358; Isaac N. Phillips, Esq., p. 390; Frederick W. Lehmann, Esq., pp. 482, 483; Hon. Henry Hitchcock, pp. 507, 515; James L. Blair, Esq., p. 526; Judge Elmer B. Adams, p. 540; Sanford B. Ladd, Esq., pp. 557, 558, 559.

VOL. III.

Judge John H. Rogers, pp. 37, 38, 39; Judge Bartlett Tripp, p. 157; Judge T. B. McFarland, p. 184; Hon. John D. Pope, p. 195; Hon. George H. Williams, pp. 219, 221; Horace G. Platt, Esq., p. 232; Judge Cornelius H. Hanford, p. 251.

**STATE LAWS TAXING THE FRANCHISES OR
FUNCTIONS OF FEDERAL INSTRUMENTAL-
TIES UNCONSTITUTIONAL—THE ENFORCE-
MENT OF SUCH LAWS MAY BE ENJOINED BY
THE FEDERAL COURTS.**

The act of Congress of 1816 rechartering the Bank of the United States was approved by President Madison. The bank had an eventful and stormy career and a disastrous fate. Its history forms one of the most interesting chapters in the workings of our institutions.¹ Its

¹ The history of the war on the bank under Jackson's administration from his first blow in the message of 1829, including the Bank Veto Message of 1832, the renewal in 1833 of the war on the bank after Jackson's re-election, the removal of the deposits by President Jackson's order, and the ensuing Panic session of Congress, etc., will be found at large in Parton's "Life of Andrew Jackson," III, chs. 20, 29, 36-39, and in Benton's "Thirty Years' View," I, pp. 153, 220, 232, 242-251, 287, 294, 373-415, 470, 471. Col. Benton led the attack on the bank, and in chapter CXI "he looks ahead" and narrates the downfall of the Bank in 1843, and the sheriff's sale of "the marble house and grounds of the Bank of the United States" and of the estate of Nicholas Biddle, its president, known as "Andalusia," its greenhouses, etc., "all on the most splendid scale." Vol. I, 472.

Mr. Webster was the protagonist of the policy of a national bank, and the leader of the bank party in its protracted struggle for existence. His relation in his legislative and professional capacity to the bank, and his views of the various constitutional and public questions involved, are satisfactorily narrated in George Ticknor Curtis' "Life of Daniel Webster," I, pp. 139-151 (as to the National Bank of 1816); pp. 414-428 (as to the renewal of the charter and the President's veto); pp. 470-499 (as to the removal of the deposits, etc.); pp. 490, 544 (as to Benton's Expunging Resolution); Webster, Works (ed. 1851), III, 35 (speech 1815); Id. 506 (removal of deposits); Id. 391

charter and unfriendly State legislation gave rise to several constitutional decisions delivered by Chief Justice Marshall of transcendent and lasting importance.

One of these — *M'Culloch v. Maryland* — has already been given in the present volume.¹ The following two cases — *Osborn v. Bank of the United States* and *The Bank of the United States v. Planters' Bank of Georgia* — are of the weightiest moment. They not only reaffirm the decision in the *Maryland Bank* case, but decide questions of extensive general importance as to scope of the grant of Federal judicial power made to the United States by the Judiciary Article of the Constitution.

There was a strong opposition in some of the States not only to the bank itself, but especially to the power given to the bank in its charter to establish branches in the States without their consent and in defiance of their wishes. Branches were established in several States against legislative remonstrances.

The unfriendly feeling in Maryland took the form of a State Stamp Act, passed in 1818, requiring all notes issued by the branch bank in that State to be upon stamped paper of the State. This was probably intended to tax the branch bank in Maryland out of existence. Out of this legislation arose the great Bank Case, so called, of *M'Culloch v. Maryland*. The decision in that case made in 1819 affirmed the constitutionality of the charter of

(bill to recharter); *Id.* 424 (veto); *Id.* 435 (constitutionality); *Id.* IV, 50, 443 (removal of deposits). See also Tyler, "Mémorial of Taney," 179-224.

The net result of this famous conflict of bank and anti-bank seems to have been that the bank gained the legal victories, and Jackson the popular victories, and that the popular victories and the President's action doomed the bank to failure.

¹ *Ante*, pp. 252-298.

the bank and declared unconstitutional the State taxing act of 1818 on the ground that it was a tax upon the operations of a fiscal agency of the United States imposed by the State without the consent of Congress.

On February 8, 1819, Ohio passed the taxing act, the validity of which was in question in the case of *Osborn v. Bank of the United States*. The leading features of that act appear in the statement of the case given below.¹

Mr. Clay, in his argument, thus differentiated the legislation of Maryland and Ohio: "But this [the Ohio act] was not, like the law of Maryland, a case of taxation. It was enacted for the purpose of expelling the branches of the bank from the State of Ohio by inflicting penalties amounting to a prohibition;—it is a bill of pains and penalties, the penalties being greater than the entire dividends. It is unequal and unjust, a confiscation, not a tax. The imposition is the same on the branch at Cincinnati with a capital of \$1,500,000, with that of Chillicothe which has a capital of only \$500,000. If one State can thus expel a branch, another may expel the parent bank, and thus this great institution of the National Government would be extirpated and destroyed by the local governments."²

Mr. Hammond's argument in support of the State legislation was very able, and he made the several points which are stated *seriatim*, and discussed and decided in the opinion of Chief Justice Marshall. One of his principal points was that the decree appealed from "assumes that the Bank of the United States is not subject to the taxing power of the State of Ohio, and decides that the law of Ohio is unconstitutional. We ask the court to reconsider so much of their opinion in the case of

¹ *Infra*, p. 475.

² 9 Wheaton, 795, 796.

M'Culloch v. Maryland as decides that the States have no rightful power to tax the bank. We ask the court to reconsider not the argument of the opinion in M'Culloch v. Maryland but the premises upon which that argument is founded."¹ He thereupon proceeds to urge that banking is a private business, and that the bank is a private concern and not a governmental agency.

The court acceded to Mr. Hammond's request, the Chief Justice saying that "many considerations combine to induce a review" of M'Culloch v. Maryland. Doubtless the most important of these was to show by further exposition and reasoning the solid foundations on which the decision in M'Culloch v. Maryland rested. It had in the end the desired effect. By the doctrine defined and enforced in Osborn v. The Bank, viz., that a State government cannot tax the franchises or operations of any of the constitutional means employed by the General Government to execute its constitutional powers, "the people of Ohio," says Chief Justice Shauck of that State, "were called back from nullification to obedience."²

The decision in Osborn's case was not, however, immediately relished in Ohio, and the State declared its adherence to the Virginia and Kentucky State rights resolutions of 1798 and 1799.³

In Col. Benton's plan of campaign in 1831 against the renewal of the charter of the bank, he determined, he says, "to avoid all settled points, *avoid the problem of constitu-*

¹9 Wheaton, 765, 766.

² Marshall Memorial, II, 229.

³ Marshall Memorial, II, 392, 393 (Phillips), where the action of Georgia and Kentucky, as well as of Ohio, in opposition to the decisions of the Supreme Court, is referred to. See *Cohens v. Virginia*, ante, pp. 357-365.

tionality," and to attack the bank on other grounds.¹ This is a recognition of the fact that by this time the effect of the decision in the Maryland and Ohio bank cases had been *practically* to settle the question of the constitutional power of Congress to charter a bank.

Nevertheless in the bank veto message of 1832 the President denied the obligatory force of the decision of the Supreme Court as to the constitutionality of the bank charter, and he also insisted that the decision did not cover the whole ground. But "if," said the President, "the opinion did cover the whole ground of this act, it ought not to control the co-ordinate authorities of this government, each for itself must be guided by its own opinion of the Constitution, *each swears to support it as he understands it*. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges; and on that point the President is independent of both."

Mr. Webster earnestly combated the position of President Jackson that every official who takes an oath to support the Constitution swears to support it "as he understands it," even though such understanding conflicts with the judgment of the Supreme Court on the subject; and, therefore, inasmuch as the Supreme Court had expressly held in a case properly presented that the existing charter of the bank was constitutional, the President had no right to deny that it was a valid law, and *therefore* ought not to be continued. The case was peculiar. This specific charter of the bank had been held constitutional by the Supreme Court; the question was whether this charter should be renewed, and Mr. Webster's contention was that the President was not justified in making it

¹ *Thirty Years' View*, vol. I, p. 187.

a ground of his veto that the charter was unconstitutional, in the face of an express decision of the Supreme Court to the contrary. Mr. Webster considered, says Mr. Curtis, such a doctrine to be revolutionary and disorganizing, since it could be extended to the execution of laws as readily as to their re-enactment or continuance, and would leave every public officer to judge what laws he would carry into effect.¹

Abstractly it is true that the opinion of the judges has no authority over Congress or the Executive in the sense that it can be directly enforced upon them;² but if Congress disregards such opinion and passes an act which is, in the judgment of the court, in conflict with the Constitution, or if the President attempts to enforce such an act, and the question of constitutionality arises in a case which comes regularly before the court, the opinion of the court will control, the act of Congress or the action of the Executive to the contrary notwithstanding. This is precisely what was decided in *Marbury v. Madison*, and such is the settled constitutional law of this country.

The power of Congress as respects national banks, as it was decided to exist in the Maryland and Ohio tax cases, is no longer controverted in any quarter or by any party. In fact the present national banking system, whose validity is unquestioned, rests upon the decisions of the Supreme Court in the *M'Culloch* and *Osborn* cases.

¹ Curtis, "Life of Daniel Webster," I, pp. 418, 419; Webster's Works, III, 29; Cooley, *Const. Limitations*, 46 and note, 53 and note.

² Marshall Memorial, Introduction, I, pp. xx-xxiv. See Worcester v. Georgia, *infra*, and notes.

Osborn and Others v. The Bank of the United States.

February Term, 1824.

[9 Wheaton's Reports, 738-903.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

It is not necessary that the record in an equity cause should contain a warrant of attorney to a duly licensed practitioner to appear for and represent a corporation which is the complainant.

The charter of the Bank of the United States confers on the bank the right to sue in any Circuit Court of the United States. Such a suit is a case arising under a law of the United States, within the meaning of those words in the Constitution; consequently it is within the judicial power of the United States, and Congress could confer upon the Circuit Courts jurisdiction over it.

A State law imposing a tax on the operations of the Bank of the United States, or on one of its branches, is unconstitutional.

A court of equity may restrain, by injunction, a public officer of a State from acting under a void law of a State to destroy a franchise.

As the State cannot be joined as a defendant, its agent may be sued alone. And if he has specific moneys and notes wrongfully taken, they may be ordered to be returned.

The answer of one defendant is evidence against another, who comes into the possession of the property in dispute by succession from the former, under

such circumstances as to be affected by his equitable liabilities.

If money be enjoined in the hands of a party who is thereby prevented from making any use of it, interest is not allowed.

The prohibition to sue a State, contained in the Eleventh Amendment of the Constitution, does not extend to cases in which a State is not made a party on the record, even if the State has the entire ultimate interest in the subject of the suit.

The bill in equity in this case was brought in the Circuit Court of the United States, in 1819, by the Bank of the United States, signed by solicitors of the court, praying an injunction to restrain the defendant Osborn, Auditor of the State of Ohio, from proceeding as he was threatening to do against the bank under an act of the Legislature of Ohio passed February 8, 1819. This act provided for levying and collecting a tax from all banks that might transact banking business in the State without being allowed to do so by the laws thereof. The act, after reciting that the Bank of the United States pursued its *operations contrary to a law of the State*, enacted that if, after the first day of the following September, the said bank or any other should continue to transact business in the State, it should be liable to a tax of \$50,000 on each office of discount and deposit. This tax the act authorized the State Auditor to collect by issuing his warrant and seizing any property he could find. One Harper, who was employed by Osborn to collect the tax, after the bill was filed, and with knowledge that an injunction had been allowed, although not yet issued, proceeded by violence to the bank, seized and took therefrom

\$100,000 in specie and bank notes belonging to it, which money afterwards came into the hands of Sullivan, State Treasurer, who was made a defendant to the suit. The Circuit Court entered a decree directing the defendants, Osborn and Sullivan, to restore to the bank the sum of \$100,000 with interest on \$19,830, the amount of specie in the hands of Sullivan. The defendants appealed to the Supreme Court of the United States under the twenty-fifth section of the Judiciary Act. The case was argued on behalf of the State officers by Charles Hammond (9 Wheaton, pp. 744-795), an eminent lawyer of Ohio, and by Henry Clay for the bank (9 Wheaton, 795-804).

At a later date after the argument, the court having expressed the wish that the case should be re-argued upon the point of the constitutionality and effect of the provision in the charter of the bank which authorizes it to sue in the Circuit Courts of the Union, it was on March 11, 1824, again argued upon that point (in connection with the case of *The Bank of the United States v. The Planters' Bank of Georgia*, in which the same question was involved) by Mr. Clay, Mr. Webster and Mr. Sergeant for the jurisdiction, and by Mr. Harper, Mr. Brown and Mr. Wright against it.

The opinion of the court,¹ delivered by the Chief Justice,

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

THOMAS TODD,

GABRIEL DUVAL,

JOSEPH STORY,

SMITH THOMPSON,

} *Associate Justices.*

Justice Johnson dissented on the point of jurisdiction.

Justice Thompson was appointed the 9th of December, 1823, and

on the question of jurisdiction and on the merits so far as relates to constitutional points, is as follows:

MARSHALL, Chief Justice. At the close of the argument a point was suggested of such vital importance as to induce the court to request Opinion. that it might be particularly spoken to. That point is, the right of the bank to sue in the courts of the United States. It has been Right of the bank to sue in United States courts. argued, and ought to be disposed of, before we proceed to the actual exercise of jurisdiction, by deciding on the rights of the parties.

Opinion on the Jurisdictional Question.

The appellants contest the jurisdiction of the court on two grounds:

1st. That the act of Congress has not given it.

2d. That, under the Constitution, Congress cannot give it.

1. The first part of the objection depends entirely on the language of the act. The words Language of the act. are, that the bank shall be "made able and capable in law" "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in all State courts having competent jurisdiction, and in any Circuit Court of the United States."

These words seem to the court to admit of but one interpretation. They cannot be made plainer by expla-

took his seat on the bench the 10th of February, 1824. He took no part in the decision of causes argued before that day.

Mr. Charles Hammond and Mr. Wright appeared for the appellants.

Mr. Henry Clay appeared for the respondents.

nation. They give, expressly, the right "to sue and be sued" "in every Circuit Court of the United States," and it would be difficult to substitute other terms which would be more direct and appropriate for the purpose. The argument of the appellants is founded on the opinion of this court in *The Bank of the United States v. Deveaux* (5 Cranch, 85).¹ In that case it was decided that the former Bank of the United States was not enabled, by the act which incorporated it, to sue in the Federal courts. The words of the third section of that act are, that the bank may "sue and be sued," etc., "in courts of record, or any other place whatsoever." The court was of opinion that these general words, which are used in all acts of incorporation, gave only a general capacity to sue, not a particular privilege to sue in the courts of the United States; and this opinion was strengthened by the circumstance that the ninth rule of the seventh section of the same act subjects the directors, in case of excess in contracting debt, to be sued, in their private capacity, "in any court of record of the United States, or either of them." The express grant of jurisdiction to the Federal courts, in this case, was considered as having some influence on the construction of the general words of the third section, which does not mention those courts. Whether this decision be right or wrong, it amounts only to a declaration that a general capacity in the bank to sue, without mentioning the courts of the Union, may not give a right to sue in those courts. To infer from this that words expressly conferring a right to sue in those courts do not give the right is surely a conclusion which the premises do not warrant.

Appellants' argument founded on opinion in case of Bank of United States v. Deveaux.

¹ *Ante*, pp. 166-179.

The act of incorporation, then, confers jurisdiction on the Circuit Courts of the United States, if Congress can confer it.

2. We will now consider the constitutionality of the clause in the act of incorporation which authorizes the bank to sue in the Federal courts.

In support of this clause it is said that the legislative, executive, and judicial powers of every well constructed government are co-extensive with each other; that is, they are potentially co-extensive. The Executive department may constitutionally execute every law which the Legislature may constitutionally make, and the Judicial department may receive from the Legislature the power of construing every such law. All governments, which are not extremely defective in their organization, must possess within themselves the means of expounding, as well as enforcing, their own laws. If we examine the Constitution of the United States, we find that its framers kept this great political principle in view. The second article vests the whole Executive power in the President; and the third article declares "that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority."

Constitutionality of clause authorizing bank to sue in the Federal courts.

This clause enables the judicial department to receive jurisdiction to the full extent of the Constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a

Extent of judicial power under the Constitution.

party who asserts his rights in the form prescribed by law. It then becomes a case, and the Constitution declares that the judicial power shall extend to all cases arising under the Constitution, laws, and treaties of the United States.

The suit of *The Bank of the United States v. Osborn* and others is a case, and the question is, whether it arises under a law of the United States?

The appellants contend that it does not, because several questions may arise in it which depend on the general principles of the law, not on any act of Congress.

Jurisdiction of United States courts in cases depending on general principles of law.

If this were sufficient to withdraw a case from the jurisdiction of the Federal courts, almost every case, although involving the construction of a law, would be withdrawn; and a clause in the Constitution, relating to a subject of vital importance to the government, and expressed in the most comprehensive terms, would be construed to mean almost nothing. There is scarcely any case every part of which depends on the Constitution, laws, or treaties of the United States. The questions, whether the fact alleged as the foundation of the action be real or fictitious; whether the conduct of the plaintiff has been such as to entitle him to maintain his action, whether his right is barred, whether he has received satisfaction, or has in any manner released his claims, are questions some or all of which may occur in almost every case; and if their existence be sufficient to arrest the jurisdiction of the court, words which seem intended to be as extensive as the Constitution, laws, and treaties of the Union, which seem designed to give the courts of the government the construction of all its acts, so far as they affect the rights of individuals, would be reduced to almost nothing.

In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct. With the exception of these cases, in which original jurisdiction is given to this court, there is none, to which the judicial power extends, from which the original jurisdiction of the inferior courts is excluded by the Constitution. Original jurisdiction, so far as the Constitution gives a rule, is co-extensive with the judicial power. We find in the Constitution no prohibition to its exercise in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied, in its appellate form only, to the most important class of cases to which it is applicable.

Original and appellate
jurisdiction of United
States courts.

The Constitution establishes the Supreme Court and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive; and then defines that which is appellate, but does not insinuate that in any such case the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance in the courts of the Union, but must first be exercised in the tribunals of the State; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States.

We perceive, then, no ground on which the proposition can be maintained that Congress is incapable of

giving the Circuit Courts original jurisdiction in any case to which the appellate jurisdiction extends.

We ask, then, if it can be sufficient to exclude this jurisdiction that the case involves questions depending on general principles?

Where case involves construction of Constitution and laws of the United States, Federal courts have jurisdiction to determine all questions.

A cause may depend on several questions of fact and law. Some of these may depend on the construction of a law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this which gives that jurisdiction. Those other questions cannot arrest the proceedings. Under this construction the judicial power of the Union extends effectively and beneficially to that most important class of cases which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the Constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim

rights under the Constitution, laws or treaties of the United States, a trial in the Federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal into which he is forced against his will.

We think, then, that when a question, to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.

The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law?

The charter of the bank is a law of the United States.

Take the case of a contract, which is put as the strongest against the bank.

When a bank sues, the first question which presents itself, and which lies at the foundation of the cause, is, Has this legal entity a right to sue? Has it a right to come, not into this court particularly, but into any

court? This depends on a law of the United States.

The bank's right to sue on contract depends on its charter — a law of the United States.

The next question is, Has this being a right to make this particular contract? If this question be decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States. These are important questions, and they exist in every possible case. The right to sue, if decided once, is decided forever; but the power of Congress was exercised antecedently to the first decision on that right, and if it was constitutional then, it cannot cease to be so because the particular question is decided. It may be revived at the will of the party, and most probably would be renewed, were the tribunal to be changed. But the question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be in fact relied on or not in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.

The appellants say that the case arises on the contract; but the validity of the contract depends on a law of the United States, and the plaintiff is compelled, in every case, to show its validity. The case arises emphatically under the law. The act of Congress

Idem.

is its foundation. The contract could never have been made but under the authority of that act. The act itself is the first ingredient in the case, is its origin, is that from which every other part arises. That other questions may also arise, as the execution of the contract, or its performance, cannot change the case, or give it any other origin than the charter of incorporation. The action still originates in, and is sustained by, that charter.

The clause giving the bank a right to sue in the Circuit Courts of the United States stands on the same principle with the acts authorizing officers of the United States, who sue in their own names, to sue in the courts of the United States. The Postmaster-General, for example, cannot sue under that part of the Constitution which gives jurisdiction to the Federal courts in consequence of the character of the party, nor is he authorized to sue by the Judiciary Act. He comes into the courts of the Union under the authority of an act of Congress, the constitutionality of which can only be sustained by the admission that his suit is a case arising under a law of the United States. If it be said that it is such a case, because a law of the United States authorizes the contract, and authorizes the suit, the same reasons exist with respect to a suit brought by the bank. That, too, is such a case; because that suit, too, is itself authorized, and is brought on a contract authorized by a law of the United States. It depends absolutely on that law, and cannot exist a moment without its authority.

Illustration: Acts of Congress authorizing officers of the United States to sue in Federal courts.

If it be said that a suit brought by the bank may depend, in fact, altogether on questions unconnected with any law of the United States, it is equally true with respect to suits brought by the Postmaster-*Idem.*

General. The plea in bar may be payment, if the suit be brought on a bond, or *non assumpsit*, if it be brought on an open account, and no other question may arise than what respects the complete discharge of the demand. Yet the constitutionality of the act authorizing the Postmaster-General to sue in the courts of the United States has never been drawn into question. It is sustained singly by an act of Congress, standing on that construction of the Constitution which asserts the right of the Legislature to give original jurisdiction to the Circuit Courts in cases arising under a law of the United States.

The clause in the patent law authorizing suits in the Circuit Courts stands, we think, on the same principle.

Illustration: Clause in patent law authorizing suits in Circuit Courts.

Such a suit is a case arising under a law of the United States. Yet the defendant may not, at the trial, question the validity of the patent, or make any point which requires the construction of an act of Congress. He may rest his defense exclusively on the fact that he has not violated the right of the plaintiff. That this fact becomes the sole question made in the cause cannot oust the jurisdiction of the court, or establish the position that the case does not arise under a law of the United States.

It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety, give a naturalized citizen, who is the mere creature of a law, a right to sue in the courts of the United States, as give that right to the bank.

No resemblance between act incorporating the bank and the general naturalization law.

This distinction is not denied; and if the act of Con-

gress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is tested by it. To use the language of the Constitution, every act of the bank arises out of this law.

A naturalized citizen is indeed made a citizen under an act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the National Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States, precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen except so far as the Constitution makes the distinction. The law makes none.

There is, then, no resemblance between the act incorporating the bank and the general naturalization law.

Upon the best consideration we have been able to bestow on this subject, we are of opinion that the clause in the act of incorporation, enabling the bank to sue in the courts of the United States, is consistent with the Constitution, and to be obeyed in all courts.

Clause in act of incorporation enabling bank to sue in United States courts consistent with the Constitution.

Opinion on the Merits.

Chief Justice Marshall next goes into the merits of the case; but of the seven points made the last two only are constitutional. All of the propositions of law decided appear in the head-notes of Mr. Justice Curtis, *supra*. We give the opinion on constitutional points in full:

We proceed now to the sixth point made by the appellants, which is that, if any case is made in the bill, proper for the interference of a court of chancery, it is against the State of Ohio, in which case the Circuit Court could not exercise jurisdiction.

Objection to jurisdiction on ground that controversy is between the bank and the State of Ohio, under Eleventh Amendment.

The bill is brought, it is said, for the purpose of protecting the bank in the exercise of a franchise granted by a law of the United States, which franchise the State of Ohio asserts a right to invade, and is about to invade. It prays the aid of the court to restrain the officers of the State from executing the law. It is, then, a controversy between the bank and the State of Ohio. The interest of the State is direct and immediate, not consequential. The process of the court, though not directed against the State by name, acts directly upon it by restraining its officers. The process, therefore, is substantially, though not in form, against the State, and the court ought not to proceed without making the State a party. If this cannot be done the court cannot take jurisdiction of the cause.

The full pressure of this argument is felt, and the difficulties it presents are acknowledged. The direct interest of the State in the suit, as brought, is admitted; and had it been in the power of the bank to make it a party, perhaps no decree ought to have been pronounced in the cause until the State was before the court. But

this was not in the power of the bank. The Eleventh Amendment of the Constitution has exempted a State from the suits of citizens of other States, or aliens; and the very difficult question is to be decided, whether, in such a case, the court may act upon the agents employed by the State, and on the property in their hands.

Before we try this question by the Constitution, it may not be time misapplied, if we pause for a moment, and reflect on the relative situation of the Union with its members, should the objection prevail.

A denial of jurisdiction forbids all inquiry into the nature of the case. It applies to cases perfectly clear in themselves; to cases where the government is in the exer-

Power of United States courts to act upon the agents employed by the State and on property in their hands.

cise of its best established and most essential powers, as well as to those which may be deemed questionable. It asserts that the agents of a State, alleging the authority of a law void in itself, because repugnant to the Constitution, may arrest the execution of any law in the United States. It maintains that, if a State shall impose a fine or penalty on any person employed in the execution of any law of the United States, it may levy that fine or penalty by a ministerial officer, without the sanction even of its own courts; and that the individual, though he perceives the approaching danger, can obtain no protection from the judicial department of the government. The carrier of the mail, the collector of the revenue, the marshal of a district, the recruiting officer, may all be inhibited, under ruinous penalties, from the per-

Cases put to illustrate danger of denial of this jurisdiction of the United States courts.

formance of their respective duties; the warrant of a ministerial officer may authorize the collection of these penalties, and the person thus obstructed in the perform-

ance of his duty may indeed resort to his action for damages, after the infliction of the injury, but cannot avail himself of the preventive justice of the Nation to protect him in the performance of his duties. Each member of the Union is capable, at its will, of attacking the Nation, of arresting its progress at every step, of acting vigorously and effectually in the execution of its designs; while the Nation stands naked, stripped of its defensive armor, and incapable of shielding its agent or executing its laws, otherwise than by proceedings which are to take place after the mischief is perpetrated, and which must often be ineffectual, from the inability of the agents to make compensation.

These are said to be extreme cases; but the case at bar, had it been put by way of illustration in argument, might have been termed an extreme case; and if a penalty on a revenue officer, for performing his duty, be more obviously wrong than a penalty on the bank, it is a difference in degree, not in principle. Public sentiment would be more shocked by the infliction of a penalty on a public officer, for the performance of his duty, than by the infliction of this penalty on a bank, which, while carrying on the fiscal operations of the government, is also transacting its own business; but, in both cases, the officer levying the penalty acts under a void authority, and the power to restrain him is denied as positively in the one as in the other.

The distinction between any extreme case and that which has actually occurred, if, indeed, any difference of principle can be supposed to exist between them, disappears when considering the question of jurisdiction; for, if the courts of the United States cannot

Power to protect agents of United States in executing laws of Union from attempts of States to resist execution of those laws.

rightfully protect the agents, who execute every law authorized by the Constitution, from the direct action of State agents in the collection of penalties, they cannot rightfully protect those who execute any law.

The question, then, is, whether the Constitution of the United States has provided a tribunal which can peacefully and rightfully protect those who are employed in carrying into execution the laws of the Union from the attempts of a particular State to resist the execution of those laws.

The State of Ohio denies the existence of this power, and contends that no preventive proceedings whatever, or proceedings against the very property which may have been seized by the agent of a State, can be sustained against such agent, because they would be substantially against the State itself, in violation of the Eleventh Amendment of the Constitution.

That the courts of the Union cannot entertain a suit brought against a State by an alien, or the citizen of another State, is not to be controverted. Is a suit, brought against an individual for any cause whatever, a suit against a State, in the sense of the Constitution?

Is suit brought against an individual a suit against a State?

The Eleventh Amendment is the limitation of a power supposed to be granted in the original instrument; and to understand accurately the extent of the limitation, it seems proper to define the power that is limited.

Eleventh Amendment.

The words of the Constitution, so far as they respect this question, are, "The judicial power shall extend to controversies between two or more States, between a State and citizens of another State, and between a State and foreign States, citizens, or subjects."

A subsequent clause distributes the power previously granted, and assigns to the Supreme Court original jurisdiction in those cases in which "a State shall be a party."

The words of the Eleventh Amendment are, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States, by citizens of another State, or by citizens or subjects of a foreign State."

The Bank of the United States contends that, in all cases in which jurisdiction depends on the character of the party, reference is made to the party on the record, not to one who may be interested, but is not shown by the record to be a party.

Do provisions of the Eleventh Amendment extend to cases where a State is not a party on the record?

The appellants admit that the jurisdiction of the court is not ousted by any incidental or consequential interest which a State may have in the decision to be made, but is to be considered as a party where the decision acts directly and immediately upon the State through its officers.

If this question were to be determined on the authority of English decisions, it is believed that no case can be adduced where any person has been considered as a party who is not made so in the record. But the court will not review those decisions, because, it is thought, a question, growing out of the Constitution of the United States, requires rather an attentive consideration of the words of that instrument than of the decisions of analogous questions by the courts of any other country.

Do the provisions, then, of the American Constitution, respecting controversies to which a State may be a party, extend, on a fair construction of that instrument, to cases in which the State is not a party on the record?

The first in the enumeration is a controversy between two or more States.

There are not many questions in which a State would be supposed to take a deeper or more immediate interest than in those which decide on the extent of her territory. Yet the

Jurisdiction in cases between citizens claiming lands under grants of different States.

Constitution, not considering the State as a party to such controversies, if not plaintiff or defendant on the record, has expressly given jurisdiction in those between citizens claiming lands under grants of different States. If each State, in consequence of the influence of a decision on her boundary, had been considered by the framers of the Constitution as a party to that controversy, the express grant of jurisdiction would have been useless. The grant of it certainly proves that the Constitution does not consider the State as a party in such a case.

Jurisdiction is expressly granted in those cases only where citizens of the same State claim lands under grants of different States. If the claimants be citizens of different States, the court takes jurisdiction for that reason. Still, the right of the State to grant is the essential point in dispute; and in that point the State is deeply interested. If that interest converts the State into a party, there is an end of the cause; and the Constitution will be construed to forbid the Circuit Courts to take cognizance of questions to which it was thought necessary expressly to extend their jurisdiction, even when the controversy arose between citizens of the same State.

We are aware that the application of these cases may be denied, because the title of the State comes on incidentally, and the appellants admit the jurisdiction of the court where its judgment does not act directly upon the property or interests of the State; but we deemed it of some

importance to show that the framers of the Constitution contemplated the distinction between cases in which a State was interested, and those in which it was a party, and made no provision for a case of interest without being a party on the record.

In cases where a State is a party on the record the question of jurisdiction is decided by inspection. If jurisdiction depend not on this plain fact, but on the interest of the State, what rule has the Constitution given by which this interest is to be measured? If no rule be given, is it to be settled by the court? If so, the curious anomaly is presented of a court examining the whole testimony of a cause, inquiring into, and deciding on, the extent of a State's interest, without having a right to exercise any jurisdiction in the case. Can this inquiry be made without the exercise of jurisdiction?

The next in enumeration is a controversy between a State and the citizens of another State.

Can this case arise if the State be not a party on the record? If it can, the question recurs, What degree of interest shall be sufficient to change the parties, and arrest the proceedings against the individual?

Controversy between a State and the citizens of another State: Can this case arise if the State be not a party on the record?

Controversies respecting boundary have lately existed between Virginia and Tennessee, between Kentucky and Tennessee, and now exist between New York and New Jersey. Suppose, while such a controversy is pending, the collecting officer of one State should seize property for taxes belonging to a man who supposes himself to reside in the other State, and who seeks redress in the Federal court of that State in which the officer resides. The interest of the State is obvious. Yet it is admitted that in such a case the action would lie, because the offi-

oer might be treated as a trespasser, and the verdict and judgment against him would not act directly on the property of the State. That it would not so act may, perhaps, depend on circumstances. The officer may retain the amount of the taxes in his hands, and, on the proceedings of the State against him, may plead, in bar, the judgment of a court of competent jurisdiction. If this plea ought to be sustained, and it is far from being certain that it ought not, the judgment so pleaded would have acted directly on the revenue of the State in the hands of its officer. And yet the argument admits that the action in such a case would be sustained. But suppose, in such a case, the party conceiving himself to be injured, instead of bringing an action sounding in damages, should sue for the specific thing, while yet in possession of the seizing officer. It being admitted, in argument, that the action sounding in damages would lie, we are unable to perceive the line of distinction between that and the action of detinue. Yet the latter action would claim the specific article seized for the tax, and would obtain it, should the seizure be deemed unlawful.

It would be tedious to pursue this part of the inquiry farther, and it would be useless, because every person will perceive that the same reasoning is applicable to all the other enumerated controversies to which a State may be a party. The principle may be illustrated by a reference to those other controversies where jurisdiction depends on the party. But before we review them, we will notice one where the nature of the controversy is in some degree blended with the character of the party.

If a suit be brought against a foreign minister, the Supreme Court alone has original jurisdiction, and this is shown on the record. But suppose a suit to be brought

which affects the interest of a foreign minister, or by which the person of his secretary, or of his servant, is arrested. The minister does not, by the mere arrest of his secretary, or his servant, become a party to this suit, but the actual defendant pleads to the jurisdiction of the court, and asserts his privilege. If the suit affects a foreign minister, it must be dismissed, not because he is a party to it, but because it affects him. The language of the Constitution in the two cases is different. This court can take cognizance of all cases "affecting" foreign ministers; and, therefore, jurisdiction does not depend on the party named in the record. But this language changes when the enumeration proceeds to States. Why this change? The answer is obvious. In the case of foreign ministers it was intended, for reasons which all comprehend, to give the National courts jurisdiction over all cases by which they were in any manner affected. In the case of States, whose immediate or remote interests were mixed up with a multitude of cases, and who might be affected in an almost infinite variety of ways, it was intended to give jurisdiction in those cases only to which they were actual parties.

In proceeding with the cases in which jurisdiction depends on the character of the party, the first in the enumeration is "controversies to which the United States shall be a party."

Does this provision extend to the cases where the

Cases where United States, though not named in record, are entitled to whole subject of controversy.

United States are not named in the record, but claim, and are actually entitled to, the whole subject in controversy?

Let us examine this question.

Suits brought by the Postmaster-General are for money due to the United States. The nominal plaintiff has no interest in the controversy, and the United States are the only real party. Yet these suits could not be instituted in the courts of the Union, under that clause which gives jurisdiction in all cases to which the United States are a party; and it was found necessary to give the court jurisdiction over them, as being cases arising under a law of the United States.

Suits by Postmaster-General.

The judicial power of the Union is also extended to controversies between citizens of different States; and it has been decided that the character of the parties must be shown on the record. Does this provision depend on the character of those whose interest is

Controversies between citizens of different States: Character of parties must be shown on record.

litigated, or of those who are parties on the record? In a suit, for example, brought by or against an executor, the creditors or legatees of his testator are the persons really concerned in interest; but it has never been suspected that, if the executor be a resident of another State, the jurisdiction of the Federal courts could be ousted by the fact that the creditors or legatees were citizens of the same State with the opposite party. The universally received construction in this case is, that jurisdiction is neither given nor ousted by the

Illustrations.

relative situation of the parties concerned in interest, but by the relative situation of the parties named on the record. Why is this construction universal? No case can be imagined in which the existence of an interest out of the party on the record is more unequivocal than in that which has been just stated. Why, then, is it universally admitted that this interest in no manner affects the jurisdiction of the court? The plain and ob-

vious answer is, because the jurisdiction of the court depends not upon this interest, but upon the actual party on the record.

Were a State to be the sole legatee, it will not, we presume, be alleged that the jurisdiction of the court, in a suit against the executor, would be more affected by this fact than by the fact that any other person, not suable in the courts of the Union, was the sole legatee. Yet, in such a case, the court would decide directly and immediately on the interest of the State.

This principle might be further illustrated by showing that jurisdiction, where it depends on the character of the party, is never conferred in consequence of the existence of an interest in a party not named; and by showing that, under the distributive clause of the second section of the third article, the Supreme Court could never take original jurisdiction in consequence of an interest in a party not named in the record.

But the principle seems too well established to require that more time should be devoted to it. It may, we think, be laid down as a rule which admits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record.

Consequently, the Eleventh Amendment, which restrains the jurisdiction granted by the Constitution over suits against States, is, of necessity, limited to those suits in which a State is a party on the record. The amendment has its full effect if the Constitution be construed as it would have been construed had the jurisdiction of the court never been extended to suits brought against a State by the citizens of another State, or by aliens.

The State not being a party on the record, and the

In all cases where jurisdiction depends on the party, it is the party named in the record.

mits of no exception, that, in all cases where jurisdiction depends on the party, it is the party named in the record.

court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties.

In pursuing the arrangement which the appellants have made for the argument of the cause, this question has already been considered. The responsibility of the

The defendants not nominal parties, but have real interest in controversy.

officers of the State for the money taken out of the bank was admitted, and it was acknowledged that this responsibility might be enforced by the proper action. The objection is to its being enforced against the specific article taken, and by the decree of this court. But it has been shown, we think, that an action of detinue might be maintained for that article, if the bank had possessed the means of describing it, and that the interest of the State would not have been an obstacle to the suit of the bank against the individual in possession of it. The judgment in such a suit might have been enforced had the article been found in possession of the individual defendant. It has been shown that the danger of its being parted with, of its being lost to the plaintiff, and the necessity of a discovery, justified the application to a court of equity. It was in a court of equity alone that the relief would be real, substantial, and effective. The parties must certainly have a real interest in the case, since their personal responsibility is acknowledged, and, if denied, could be demonstrated.

It was proper, then, to make a decree against the defendants in the Circuit Court, if the law of the State of Ohio be repugnant to the Constitution, or to a law

of the United States made in pursuance thereof, so as to furnish no authority to those who took, or to those who received, the money for which this suit was instituted.

7. Is that law unconstitutional?

Constitutionality of
law of Ohio taxing
Bank of United States.

This point was argued with great ability, and decided by this court, after mature and deliberate consideration, in the case of *M'Culloch v. The State of Maryland*. A revision of that opinion has been requested; and many considerations combine to induce a review of it.

The foundation of the argument in favor of the right of a State to tax the bank is laid in the supposed character of that institution. The argument supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, with its own views, would certainly be subject to the taxing power of the State, as any individual would be; and the casual circumstance of its being employed by the government in the transaction of its fiscal affairs would no more exempt its private business from the operation of that power than it would exempt the private business of any individual employed in the same manner. But the premises are not true. The bank is not considered as a private corporation, whose principal object is individual trade and individual profit; but as a public corporation, created for public and national purposes. That the mere business of

The bank is a public
corporation created for
public and national
purposes.

banking is, in its own nature, a private business, and may be carried on by individuals or companies having no political connection with the government, is admitted; but the bank is not such an individual or company. It was not created for its own sake, or for private purposes. It has never been supposed that Congress could create such a corporation. The whole opinion of the court in the case of *M'Culloch v. The State of Maryland* is founded on, and sustained by, the idea that the bank is an instrument which is "necessary and proper for carrying into effect the powers vested in the government of the United States." It is not an instrument which the government found ready made, and has supposed to be adapted to its purposes; but one which was created, in the form in which it now appears, for national purposes only. It is undoubtedly capable of transacting private as well as public business. While it is the great instrument by which the fiscal operations of the government are effected, it is also trading with individuals for its own advantage. The appellants endeavor to distinguish between this trade and its agency for the public, between its banking operations and those qualities which it possesses in common with every corporation, such as individuality, immortality, etc. While they seem to admit the right to preserve this corporate existence, they deny the right to protect it in its trade and business.

If there be anything in this distinction, it would tend to show that so much of the act as incorporates the bank is constitutional, but so much of it as authorizes its banking operations is unconstitutional. Congress can make the inanimate body, and employ the machine as a de-

Opinion in M'Culloch v. Maryland.

Distinction between public and private character of bank considered.

pository of, and vehicle for, the conveyance of the treasure of the Nation, if it be capable of being so employed, but cannot breathe into it the vital spirit which alone can bring it into useful existence.

Let this distinction be considered.

Why is it that Congress can incorporate or create a bank? This question was answered in the case of *M'Culloch v. The State of Maryland*. It is an instrument which is "necessary and proper" for carrying on the

fiscal operations of government. Can this instrument, on any rational calculation, effect its object unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without as with this faculty, there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve it originates in the same principle with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

This distinction, then, has no real existence. To tax its faculties, its trade and occupation, is to tax the bank

itself. To destroy or preserve the one is to destroy or preserve the other.

It is urged that Congress has not, by this act of incorporation, created the faculty of trading in money; that it had anterior existence, and may be carried on by a private individual, or company, as well as by a corporation. As this profession or business may be taxed, regulated or restrained when conducted by an individual, it may, likewise, be taxed, regulated or restrained when conducted by a corporation.

The bank protected against State taxation because it is an instrumentality of government.

The general correctness of these propositions need not be controverted. Their particular application to the question before the court is alone to be considered. We do not maintain that the corporate character of the bank exempts its operations from the action of State authority. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties. The operations of the bank are believed not only to yield the compensation for its services to the government, but to be essential to the performance of those services. *Idem.*

Those operations give its value to the currency in which all the transactions of the government are conducted. They are, therefore, inseparably connected with those transactions. They enable the bank to render those services to the Nation for which it was created, and are, therefore, of the very essence of its character as national instruments. The business of the bank constitutes its capacity to perform its functions, as a machine for the money transactions of the government. Its corporate character is merely an incident, which enables it to transact that business more beneficially.

Were the Secretary of the Treasury to be authorized by law to appoint agencies throughout the Union, to perform the public functions of the bank, and to be endowed with its faculties, as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor, and expense, the profits of the banking business, instead of other emoluments, to be drawn from the treasury, which banking business was essential to the operations of the government, would each State in the Union possess a right to control these operations? The question on which this right would depend must always be, Are these faculties so essential to the fiscal operations of the government as to authorize Congress to confer them? Let this be admitted, and the question, Does the right to preserve them exist? must always be answered in the affirmative.

Congress was of opinion that these faculties were necessary to enable the bank to perform the services which are exacted from it and for which it was created. This was certainly a question proper for the consideration of the National Legislature. But were it now to undergo revision, who would have the hardihood to say that, without the employment of a banking capital, those services could be performed? That the exercise of these faculties greatly facilitates the fiscal operations of the government is too obvious for controversy; and who will venture to affirm that the suppression of them would not materially affect those operations, and essen-

Power to conduct banking business necessary to enable bank to perform its services to the government.

tially impair, if not totally destroy, the utility of the machine to the government? The currency which it circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purposes of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and objects of the institution.

The appellants admit that, if this faculty be necessary to make the bank a fit instrument for the purposes of the government, Congress possesses the same ^{Idem.} power to protect the machine in this, as in its direct fiscal operations; but they deny that it is necessary to those purposes, and insist that it is granted solely for the benefit of the members of the corporation. Were this proposition to be admitted, all the consequences which are drawn from it might follow. But it is not admitted. The court has already stated its conviction that, without this capacity to trade with individuals, the bank would be a very defective instrument, when considered with a single view to its fitness for the purposes of government. On this point the whole argument rests.

It is contended that, admitting Congress to possess the power, this exemption ought to have been expressly asserted in the act of incorporation; and, not being expressed, ought not to be implied by the court.

Exemption of bank from State control implied.

It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Con-

gress to imply, without expressing, this very exemption from State control which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which these institutions are created, and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security.

That department has no will in any case. If the sound construction of the act be that it exempts the trade of the bank, as being essential to the character of a machine necessary to the fiscal operations of the government, from the control of the States, courts are as much bound to give it that construction as if the exemption had been established in express terms. Judicial power, as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise a discretion it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and when that is discerned it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the Legislature, or, in other words, to the will of the law.

The appellants rely greatly on the distinction between

Illustrations of implied exemptions.

Duty of court in construing the act of Congress.

the bank and the public institutions, such as the mint or the post-office. The agents in those offices are, it is said, officers of government, and are excluded from a seat in Congress. Not so the directors of the bank. The connection of the government with the bank is likened to that with contractors.

It will not be contended that the directors or other officers of the bank are officers of government. But it is contended that, were their resemblance to contractors

Bank's relation with government does not resemble that of contractors.

more perfect than it is, the right of the State to control its operations, if those operations be necessary to its character as a machine employed by the government, cannot be maintained. Can a contractor for supplying a military post with provisions be restrained from making purchases within any State, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit that the act of purchasing, or of conveying the articles purchased, can be under State control.

If the trade of the bank be essential to its character as a machine for the fiscal operations of the government, that trade must be as exempt from State control as the actual conveyance of the public money. Indeed, a tax bears upon the whole machine, as well upon the faculty of collecting and transmitting the money of the Nation as on that of discounting the notes of individuals. No distinction is taken between them.

Considering the capacity of carrying on the trade of banking as an important feature in the character of this corporation, which was necessary to make it a fit instrument for the objects for which it was created, the court adheres to its decision in the case of *M'Culloch v. The State of Maryland*, and is of opinion that the act of the State of Ohio, which is certainly much more objectionable than that of the State of Maryland, is repugnant to a law of the United States made in pursuance of the Constitution, and, therefore, void. The counsel for the appellants are too intelligent, and have too much self-respect, to pretend that a void act can afford any protection to the officers who execute it. They expressly admit that it cannot.

Court adheres to decision in *M'Culloch v. Maryland*.

Act of State of Ohio in question held void.

It being, then, shown, we think conclusively, that the defendants could derive neither authority nor protection from the act which they executed, and that this suit is not against the State of Ohio within the view of the Constitution, the State being no party on the record, the only real question in the cause is, whether the record contains sufficient matter to justify the court in pronouncing a decree against the defendants? That this question is attended with great difficulty has not been concealed or denied. But when we reflect that the defendants, Osborn and Harper, are incontestably liable for the full amount of the money taken out of the bank; that the defendant, Currie, is also responsible for the sum received by him, it having come to his hands with full knowledge of the unlawful means by which it was acquired; that the defendant, Sullivan, is also responsible for the sum specifically delivered to him, with notice that it was the prop-

Power of court to pronounce a decree against the defendants in the cause.

erty of the bank, unless the form of having made an entry on the books of the treasury can countervail the fact that it was, in truth, kept untouched in a trunk by itself, as a deposit, to await the event of the pending suit respecting it; we may lay it down as a proposition, safely to be affirmed, that all the defendants in the cause were liable in an action at law for the amount of this decree. If the original injunction was properly awarded, for the reasons stated in the preceding part of this opinion, the money having reached the hands of all those to whom it afterwards came, with notice of that injunction, might be pursued, so long as it remained a distinct deposit, neither mixed with the money of the treasury nor put into circulation. Were it to be admitted that the original injunction was not properly awarded, still the amended and supplemental bill, which brings before the court all the parties who had been concerned in the transaction, was filed after the cause of action had completely accrued. The money of the bank had been taken without authority by some of the defendants, and was detained by the only person who was not an original wrong-doer, in a specific form; so that detainee might have been maintained for it, had it been in the power of the bank to prove the facts which are necessary to establish the identity of the property sued for. Under such circumstances we think a court of equity may afford its aid on the ground that a discovery is necessary, and also on the same principle that an injunction issues to restrain a person who has fraudulently obtained possession of negotiable notes from putting them into circulation, or a person having the apparent ownership of stock really belonging to another from transferring it. The suit, then, might be as well sustained in a court of equity as in a court of law, and

the objection that the interests of the State are committed to subordinate agents, if true, is the unavoidable consequence of exemption from being sued — of sovereignty. The interests of the United States are sometimes committed to subordinate agents. It was the case in *Hoyt v. Gelston*, in the case of *The Apollon*, and in the case of *Doddridge's Lessee v. Thompson and Wright*, and in many others. An independent foreign sovereign cannot be sued, and does not appear in court. But a friend of the court comes in, and, by suggestion, gives it to understand that his interests are involved in the controversy. The interests of the sovereign, in such a case, and in every other where he chooses to assert them under the name of the real party to the cause, are as well defended as if he were a party to the record. But his pretensions, where they are not well founded, cannot arrest the right of a party having a right to the thing for which he sues. Where the right is in the plaintiff and the possession in the defendant, the inquiry cannot be stopped by the mere assertion of title in a sovereign. The court must proceed to investigate the assertion and examine the title. In the case at bar, the tribunal established by the Constitution for the purpose of deciding ultimately, in all cases of this description, had solemnly determined that a State law imposing a tax on the Bank of the United States was unconstitutional and void, before the wrong was committed for which this suit was brought.

Decree affirmed except as to interest on the coin which the injunction restrained the defendants from using.

NOTE.

In the foregoing case the court not only reasserted the decision in *M'Culloch v. Maryland*, as to the constitutionality of a bank charter, and the unconstitutionality of the State taxing act, but also decided the following constitutional points of the greatest importance:

1. The charter of the bank conferred upon it in express terms the right "to sue and be sued in any Circuit Court of the United States," and it was held in this case that the provision was constitutional, and that under the Constitution it is competent for Congress to make the original jurisdiction of the Circuit Courts co-extensive with the appellate jurisdiction of the Supreme Court. This proposition is now settled and undisputed law.

2. That under the Constitution and the legislation of Congress, and notwithstanding the Eleventh Amendment, the Federal courts may in an equity suit restrain, by injunction, an officer of the State from enforcing a void tax law of the State against an agency of the General Government, thereby injuriously affecting or destroying franchises or rights granted by Congress; and this may be done although the State be the sole ultimate party in interest and is not and cannot be made a party defendant on the record to the suit.¹

REFERENCES TO OSBORN v. BANK OF UNITED STATES, IN
MARSHALL MEMORIAL.

VOL. I.

Justice Horace Gray, pp. 70, 93.

VOL. II.

Chief Justice John A. Shauck, p. 229; Hampton L. Carson, Esq., p. 261; Hon. William A. Ketcham, p. 294; Hon. William Lindsay, p. 358; Isaac N. Phillips, Esq., pp. 390, 392.

VOL. III.

Judge Cornelius H. Hanford, p. 251.

¹ Curtis, *Jurisdiction of the United States Courts*, 12, 15, 16, 57, 157.

CONSTITUTIONAL SCOPE OF FEDERAL JUDICIAL POWER OVER CORPORATIONS IN WHICH A STATE IS INTERESTED.

The next case — *Bank of the United States v. Planters' Bank of Georgia* — was argued in connection with *Osborn v. The Bank*, as shown in the prefatory statement to that case.¹

The Bank of the United States v. The Planters' Bank of Georgia.

February Term, 1894.

[9 Wheaton's Reports, 904-914.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

As the Bank of the United States does not derive its capacity to sue from the Judiciary Act, it is not affected by the prohibition contained in the eleventh section of that act concerning suits by assignees, nor is the citizenship of those interested to be regarded. The fact that a State is one of the stockholders in a banking corporation does not prevent the corporation from being sued in the courts of the United States.

¹ See *ante*, p. 476.

The questions in this case are stated fully in the following opinion of the court:¹

MARSHALL, Chief Justice. In this case, the petition of the plaintiffs, which, according to the practice of the State of Georgia, is substituted for a declaration, Opinion. is founded on promissory notes payable to a person named in the notes, "*or bearer*," and states that the notes were "duly transferred, assigned, and delivered" to the plaintiffs, "who thereby became the lawful bearer thereof, and entitled to payment of the sums therein specified; and that the defendants, in consideration of their liability, assumed," etc.

The Planters' Bank pleads to the jurisdiction of the court, and alleges that it is a corporation of which the State of Georgia, and certain individuals, who are citizens of the same State with some of the plaintiffs, are members. The plea also alleges that the persons to whom the notes mentioned in the petition were made payable were citizens of the State of Georgia, and, therefore, incapable of suing the said bank in a Circuit Court of the United

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice*.

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

THOMAS TODD,

GABRIEL DUVAL,

JOSEPH STORY,

SMITH THOMPSON,

} *Associate Justices.*

Justice Johnson dissenting.

Justice Thompson was appointed the 9th of December, 1823, and took his seat on the bench the 10th of February, 1824. He took no part in the decision of causes argued before that day.

Mr. Clay, Mr. Webster and Mr. Sergeant for the jurisdiction.

Mr. Harper, Mr. Brown and Mr. Wright against the jurisdiction.

States; and, being so incapable, could not, by transferring the notes to the plaintiffs, enable them to sue in that court.

To this plea the plaintiffs demurred, and the defendants joined in demurrer.

On the argument of the demurrer, the judges were divided on two questions:

1. Whether the averments in the declaration be sufficient in law to give this court jurisdiction of the cause?

Judges divided on two questions.

2. Whether, on the pleadings in the same, the plaintiffs be entitled to judgment?

The first question was fully considered by the court in the case of *Osborn v. The Bank of the United States*,¹ and it is unnecessary to repeat the reasoning used in that case. We are of opinion that the averments in the declaration are sufficient to give the court jurisdiction of the cause.

This court has jurisdiction of the cause.

2d. The second point is understood to involve two questions:

1. Does the circumstance that the State is a corporator bring this cause within the clause in the Constitution which gives jurisdiction to the Supreme Court where a State is a party, or bring it within the Eleventh Amendment?

Does the fact of the State being a corporator bring this cause under art. 3, sec. 2, of the Constitution, or under Amendment XI?

2. Does the fact that the note is made payable to a citizen of the State of Georgia, or bearer, oust the jurisdiction of the court?

1. Is the State of Georgia a party defendant in this case? If it is, then the suit, had the Eleventh Amendment never been adopted, must have been brought in the Supreme

¹ See *ante*, pp. 474 *et seq.* As to Federal jurisdiction over corporations, see *Bank v. Deveaux*, *ante*, p. 186, and notes.

Court of the United States. Could this court have entertained jurisdiction in the case?

We think it could not. To have given the Supreme Court original jurisdiction, the State must be plaintiff or defendant as a State, and must, as a State, be a party on the record. A suit against the Planters' Bank of Georgia is no more a suit against the State of Georgia than against any other individual corporator. The State is not a party, that is, an entire party in the cause.

The State is not an entire party in this cause.

If this suit could not have been brought originally in the Supreme Court, it would be difficult to show that it is within the Eleventh Amendment. That amendment does not purport to do more than to restrain the construction which might otherwise be given to the Constitution; and if this case be not one of which

Eleventh Amendment simply restrains the construction which might be given to the Constitution.

the Supreme Court could have taken original jurisdiction, it is not within the Amendment. This is not, we think, a case in which the character of the defendant gives jurisdiction to the court. If it did, the suit could be instituted only in the Supreme Court. This suit is not to be sustained because the Planters' Bank is suable in the Federal courts, but because the plaintiff has a right to sue any defendant in that court who is not withdrawn from its jurisdiction by the Constitution or by law. The suit is against a corporation, and the judgment is to be satisfied by the property of the corporation, not by that

Planters' Bank of Georgia is not the State of Georgia.

of the individual corporators. The State does not, by becoming a corporator, identify itself with the corporation. The Planters' Bank of Georgia is not the State of Georgia, although the State holds an interest in it.

It is, we think, a sound principle, that, when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen. Instead of communicating to the company its privileges and its prerogatives, it descends to a level with those with whom it associates itself, and takes the character which belongs to its associates and to the business which is to be transacted.

If a government becomes a partner in a trading company, it assumes, while in that company, the character of a private citizen.

Thus, many States of this Union who have an interest in banks are not suable even in their own courts; yet they never exempt the corporation from being sued. The State of Georgia, by giving to the bank the capacity to sue and be sued, voluntarily strips itself of its sovereign character so far as respects the transactions of the bank, and waives all the privileges of that character. As a member of a corporation a government never exercises its sovereignty. It acts merely as a corporator and exercises no other powers, in the management of the affairs of the corporation, than are expressly given by the incorporating act.

In such case the government does not invest the company with any privileges but descends to the level of its partners.

The government of the Union held shares in the old Bank of the United States; but the privileges of the government were not imparted by that circumstance to the bank. The United States was not a party to suits brought by or against the bank, in the sense of the Constitution. So with respect to the present bank. Suits brought by or against it are not understood to be brought by or against the United States. The government, by becoming a corporator, lays down its sovereignty so far as respects the transactions of the corporation, and ex-

ercises no power or privilege which is not derived from the charter.

We think, then, that the Planters' Bank of Georgia is not exempted from being sued in the Federal courts by the circumstance that the State is a corporator.

Planters' Bank may be sued in the Federal courts.

2. We proceed next to inquire whether the jurisdiction of the court is ousted by the circumstance that the notes on which the suit was instituted were made payable to citizens of the State of Georgia.

Without examining whether in this case the original promise is not to the bearer, the court will proceed to the more general question, whether the bank, as indorsee, may maintain a suit against the maker of a note payable to a citizen of the State. The words of the Judiciary Act, section eleventh, are, "Nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note, or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

Wording of eleventh section of Judiciary Act.

This is a limitation on the jurisdiction conferred by the Judiciary Act. It was apprehended that bonds and notes given, in the usual course of business, by citizens of the same State to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in the Federal courts. To remove this inconvenience, the act, which gives jurisdiction to the courts of the Union over suits brought by the citizen of one State against the citizen of another, restrains that jurisdiction, where the suit is

A limitation on jurisdiction.

brought by an assignee, to cases where the suit might have been sustained, had no assignment been made. But the bank does not sue in virtue of any right conferred by the Judiciary Act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different State from any of its members, but because its charter confers upon it the right of suing its debtors in a Circuit Court of the United States.

If the bank could not sue a person who was a citizen of the same State with any one of its members, in the Circuit Court, this disability would defeat the power. There is, probably, not a commercial State in the Union, some of whose citizens are not members of the Bank of the United States. There is, consequently, scarcely a debt due to the bank for which a suit could be maintained in a Federal court, did the jurisdiction of the court depend on citizenship. A general power to sue in any Circuit Court of the United States, expressed in terms obviously intended to comprehend every case, would thus be construed to comprehend no case. Such a construction cannot be the correct one.

We think, then, that the charter gives to the bank a right to sue in the Circuit Courts of the United States, without regard to citizenship; and that the certificate on both questions must be in favor of the plaintiff.

Charter gives to bank the right to sue in Circuit Courts of United States.

NOTE.

"The same principle applies to cases where a State has an interest in a corporation; as when it is a stockholder in an incorporated bank, the corporation is still suable, although the State, as such, is exempted from any action." Story, *Com. on Const.*, III, ch. xxxviii, § 1680.

"The government, by becoming a corporator, lays down its sovereignty, so far as respects the transactions

of the corporation, and exercises no power or privilege which is not derived from the charter." Story, Com. on Const., III, xxxviii, § 1681. See also Kent, Com. (12th Ed.), I, 351, 352.

In the case of *Bank of Kentucky v. Wister*, 2 Peters, 318, it was decided that an incorporated bank was suable, though the whole property and control of the bank belonged to the State incorporating it. See McMaster, Hist. of People of U. S., V, 412, note.

Many cases have arisen presenting in various ways the question what, under the Eleventh Amendment, is a suit against the State, and when suits against an officer of a State are held to be suits against the State and when otherwise. These questions are illustrated in the following important cases in the Supreme Court of the United States: *Fitts v. McGhee*, 172 U. S. 516; *Scott v. Donald*, 165 U. S. 58; *Reagan v. Farmers' Loan & Trust Co.*, 154 U. S. 362; *State of North Carolina v. Temple*, 184 U. S. 22; *Christian v. Atlantic & N. C. R. Co.*, 133 U. S. 233; *Ex parte Ayers*, 123 U. S. 443; *Poindexter v. Greenhow*, 114 U. S. 270, 330; *Ames v. State of Kansas*, 111 U. S. 449; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446.

REFERENCE TO UNITED STATES BANK *v.* PLANTERS' BANK,
IN MARSHALL MEMORIAL.

In *The Bank of the United States v. Planters' Bank of Georgia*, 9 Wheaton, 904, the court held that the fact that a State was the owner of stock in a corporation did not deprive the United States courts of jurisdiction, and that when a State accepted the position of a stockholder it abdicated its sovereignty. *Hon. William A. Ketcham*, II, 295.

PARAMOUNT POWER OF CONGRESS TO REGULATE COMMERCE—THE STATES CANNOT TAX COMMERCE NOR REQUIRE AN IMPORTER TO TAKE A LICENSE AND PAY A REVENUE LICENSE FEE THEREFOR BEFORE HE CAN SELL THE IMPORTED ARTICLE IN THE ORIGINAL PACKAGE.

The next case — *Brown v. Maryland* — has always and justly been regarded as one of the most important, and Chief Justice Marshall's opinion therein one of the ablest, in the constitutional history of the Supreme Court. It is a sequel of *Gibbons v. Ogden*¹ so far as it relates to the commerce clause of the Constitution, and it reaffirms the paramountcy of Congress over the subject of commerce. It is a sequel also of *M'Culloch v. Maryland*² so far as it relates to the power of taxation in the States, and it reaffirms the principle that such power of taxation is subject, like the police power and other powers of the States, to the paramountcy of Congress where the action of the States comes in collision with the Constitution or with the laws and treaties of the United States.

But the State statute in question in *Brown v. Maryland* (the text whereof is given in the opinion of the Chief Justice), which expressly and directly acted on the importer of foreign merchandise and required him, under penalties and forfeitures, to take out a license from the State and pay a revenue license tax of \$50 therefor before he should be authorized to sell in the original pack-

¹ See *ante*, p. 421.

² See *ante*, p. 252.

age the article imported, presented the subject of the scope of the grant of power to Congress to regulate commerce, and the extent of the prohibition in the Constitution upon the States to "lay any duties upon imports" in novel, very interesting and most important and vital aspects.

The Maryland law was, after able arguments by eminent counsel, held to be in conflict both with the grant of power to Congress over commerce and with the prohibition on the States to levy duties on imports.

The fundamental, wide-reaching and all-important conclusion was reached that any penalty or any tax imposed by a State upon the importer in his character of importer, whether that tax be upon the thing imported or upon the person of the importer as a condition of the right of the importer to sell the article imported while in the original package, is in violation of the Constitution and consequently void.

The case before the court related to foreign commerce, but the court deemed it proper or important to add that "the principles laid down in this case apply equally to importations from a sister State," thus securing the freedom of *all* commerce, foreign and between the States of the Union, from all pecuniary exactions on the part of the States in the way of duties, taxes, penalties or forfeitures. How largely the amazing prosperity of our country is owing to the freedom of commerce which these great decisions of the Chief Justice established, everybody now acknowledges.¹

The soundness of the decision in *Brown v. Maryland* has never been questioned, although aberrations from

¹ Marshall Memorial, I, 378, 379 (Dillon); pp. 413, 414 (Cookran); II, 261 (Carson).

the essential and vital principles that underlie it may, perhaps, be occasionally observed in the application of those principles to the special facts in certain subsequent cases. But no departure by the court from those principles has ever been professed or acknowledged; on the contrary, those principles have repeatedly been re-affirmed.¹

Mr. Taney, afterwards the successor of Marshall, argued the case of *Brown v. Maryland* in the Supreme Court in support of the Maryland legislation. Many years afterwards, 1847, this great and able judge put upon record, in his opinion in the License Cases,² these

¹ See cases cited in note, *infra*.

Mr. Justice Bradley, himself a great constitutional judge, pays the following tribute to Chief Justice Marshall: "A great number and variety of cases involving the commercial power of Congress have been brought to the attention of this court during the past fifteen years which have frequently made it necessary to re-examine the whole subject with care; and the result has sometimes been that, in order to give full and fair effect to the different clauses of the Constitution, the court has felt constrained to recur to the fundamental principles stated and illustrated with so much clearness and force by Chief Justice Marshall and other members of the court in former times, and to modify in some degree certain dicta and decisions that have occasionally been made in the intervening period. This is always done, however, with great caution, and an anxious desire to place the final conclusion reached upon the fairest and most just construction of the Constitution in all its parts." (*Leloup v. Port of Mobile*, 127 U. S. 640, 648.)

² 5 Howard, 504, 575 (1846).

Chief Justice Taney, referring fourteen years later to the case of *Brown v. Maryland* in *Almy v. State of California*, 24 How. 169, 178 (1860), in which it was decided that a State stamp tax on bills of lading was void, said: "We think this case cannot be distinguished from that of *Brown v. Maryland*. That case was decided in 1827, and the decision has always been regarded and followed as the true construction of the clause of the Constitution now in question."

interesting observations in reference to *Brown v. Maryland*: "I at that time persuaded myself that I was right, and thought the decision of the court restricted the powers of the State more than a sound construction of the Constitution of the United States would warrant. But further and more mature reflection has convinced me that the rule laid down by the Supreme Court is a just and safe one, and, perhaps, the best that could have been adopted for preserving the right of the United States on the one hand, and of the States on the other, and preventing collision between them."

Many lawyers have had a similar experience in subsequently concluding that the court was right, although in the ardor of advocacy they thought it was wrong; but this is less important than the weighty and matured judgment of Chief Justice Taney, so solemnly expressed, that the decision in *Brown v. Maryland* is a sound exposition and application of the Constitution of the United States.

In reviewing the subsequent legislation of the States, by which, in such a variety of artful forms and ingenious devices, they have sought to derive revenue from both foreign and interstate commerce at the expense of its constitutional freedom as declared and established in the opinions of Chief Justice Marshall,¹ the one idea above all others that impresses us is the wonderful sagacity and prevision of Marshall, who saw that the least recognition of any right whatever to tax commerce in any form or to any extent would not only be fatal to its freedom, but to that equality and harmony among the States so

¹ For a review of important cases on the subject of State laws in conflict with the provision of the Constitution giving Congress power to regulate commerce, etc., see Miller, *Const. of U. S.*, 468-469.

essential to the general welfare, and in the long run to the welfare of the States themselves. Most truly, most wisely was it declared "that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised."

In conceding as Marshall did the general power of the States to tax all persons and property within their jurisdiction, subject only to the Constitution of the United States, and yet to demonstrate that the exaction of a revenue license tax from the importer on his character of importer as a condition of being able lawfully to sell the imported article in its original shape, was not simply a license or occupation tax which the States may rightfully impose, but was, under the Maryland act, a tax upon commerce which was forbidden to the States,—to demonstrate this, and to demonstrate so clearly as to silence controversy, must we think be ranked as among Marshall's great judicial achievements.

The distinguishing feature of the case may perhaps be thus concisely expressed, namely: the Maryland Act undertook to levy a tax upon the right of the importer, or others, to sell the article imported in the original package,¹ which tax the court held to be in conflict with the Federal Constitution.

¹ "When these packages were broken and the goods were used or offered for sale outside of such original packages, they had become incorporated into the general property of the State, and were liable to such taxation as the State imposed on other property." *Miller, Const. of U. S.*, 591; *Cooley, Const. Lim.*, 485. So in *Leisy v. Hardin*, 135 U. S. 100, the Supreme Court followed the principle laid down in *Brown v. Maryland*, and held that the object of taxation was not subject to State power upon its arrival at the *terminus ad quem* if sold by importer in its original package, unbroken and unopened. Three judges dissented in this case.

It is not inconsistent with this decision to hold that imported articles, even while in the original package, are subject to reasonable police regulations for the protection of the lives, health, comfort and convenience of the people.¹

Brown and Others v. The State of Maryland.

January Term, 1827.

[12 Wheaton's Reports, 419-460.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

A State law requiring an importer to take a license and pay \$50 before he should be permitted to sell a package of imported goods is in conflict with that provision of the Constitution of the United States which prohibits a State from laying any impost, etc., and also with the clause which declares that Congress shall have power to regulate commerce.

An act of the Legislature of Maryland required all importers of foreign goods, by bale or package, etc., to take out a license before being permitted to sell such goods. For this license they should pay a tax of fifty dollars, and, in the event of neglect or refusal to do so, subjected them to certain penalties and forfeitures. The indictment charged the plaintiffs in error (Brown and others) with importing and selling a package of dry goods without having a license under the Maryland law. To this indictment the plaintiffs in error demurred, and

¹ See note, *infra*, pp. 545-547, as to the relation of the police power of the States to the power of Congress over commerce.

judgment was taken against them on the demurrer for the penalty prescribed by the act. This cause came up to the Supreme Court by writ of error, brought by Brown and others, to a judgment given by the Court of Appeals of Maryland, affirming the conviction.

The counsel for plaintiffs in error contended that the act of the Legislature was in violation of two provisions of the Constitution of the United States: first, under article 1, section 10, clause 2, which forbids any State, without the consent of Congress, to lay any imposts or duties on imports or exports, etc.; and second, under article 1, section 8, clause 3, which gives to Congress the power to regulate commerce with foreign nations and among the several States, etc.

The opinion of the court¹ is as follows :

MARSHALL, Chief Justice. This is a writ of error to a judgment rendered in the Court of Appeals of Maryland, affirming a judgment of the City Court of Baltimore, on an indictment found in that court against the plaintiffs in error, for violating an act of the

Opinion.

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

GABRIEL DUVAL,

JOSEPH STORY,

SMITH THOMPSON,

ROBERT TRIMBLE,

} *Associate Justices.*

Mr. Justice Thompson dissenting.

Mr. Jonathan Meredith and Attorney-General William Wirt appeared for plaintiffs in error.

Mr. Roger B. Taney and Mr. Reverdy Johnson appeared for defendant in error.

Legislature of Maryland. The indictment was founded on the second section of that act, which is in these words: "And be it enacted that all importers of foreign articles or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey, and other distilled spirituous liquors, etc., and other persons selling the same by wholesale, bale, or package, hogshead, barrel, or tierce, shall, before they are authorized to sell, take out a license, as by the original act is directed, for which they shall pay fifty dollars; and, in case of neglect or refusal to take out such license, shall be subject to the same penalties and forfeitures as are prescribed by the original act to which this is a supplement." The indictment charges the plaintiffs in error with having imported and sold one package of foreign dry goods without having license to do so. A judgment was rendered against them on demurrer for the penalty which the act prescribes for the offense; and that judgment is now before this court.

The cause depends entirely on the question whether the Legislature of a State can constitutionally require the importer of foreign articles to take out a license from the State before he shall be permitted to sell a bale or package so imported.

Sole question in the case.

It has been truly said that the presumption is in favor of every legislative act, and that the whole burden of proof lies on him who denies its constitutionality. The plaintiffs in error take the burden upon themselves, and insist that the act under consideration is repugnant to two provisions in the Constitution of the United States.

Clauses of the Constitution which bear on this case.

1. To that which declares that "no State shall, without the consent of Congress, lay any imposts, or duties

on imports or exports, except what may be absolutely necessary for executing its inspection laws."¹

2. To that which declares that Congress shall have power "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."²

1. The first inquiry is into the extent of the prohibition upon States "to lay any imposts, or duties on imports or exports." The counsel for the State of Maryland would confine this prohibition to laws imposing duties on the act of importation or exportation. The counsel for the plaintiffs in error give it a much wider scope.

In performing the delicate and important duty of construing clauses in the Constitution of our country, which involve conflicting powers of the government of the Union and of the respective States, it is proper to take a view of the literal meaning of the words to be expounded, of their connection with other words, and of the general objects to be accomplished by the prohibitory clause, or by the grant of power.

What, then, is the meaning of the words, "imposts, or duties on imports or exports?"

An impost, or duty on imports, is a custom or a tax levied on articles brought into a country, and is most usually secured before the importer is allowed to exercise his rights of ownership over them, because evasions of the law can be prevented more certainly by executing it while the articles are in its custody. It would not, however, be less an impost or duty on the articles, if it were to be levied on them after they were landed. The policy, and conse-

Meaning of "imposts or duties on imports or exports."

¹ Article I, section 10.

² Article I, section 8.

quent practice, of levying or securing the duty before or on entering the port, does not limit the power to that state of things, nor, consequently, the prohibition, unless the true meaning of the clause so confines it. What, then, are "imports?" The lexicons inform us, they are "things imported." If we appeal to usage for the meaning of the word, we shall receive the same answer. They are the articles themselves which are brought into the country. "A duty on imports," then, is not merely a duty on the act of importation, but is a duty on the thing imported. It is not, taken in its literal sense, confined to a duty levied while the article is entering the country, but extends to a duty levied after it has entered the country. The succeeding words of the sentence which limit the prohibition show the extent in which it was understood. The limitation is, "except what may be absolutely necessary for executing its inspection laws." Now, the inspection laws, so far as they act upon articles for exportation, are generally executed on land, before the article is put on board the vessel; so far as they act upon importations they are generally executed upon articles which are landed. The tax or duty of inspection, then, is a tax which is frequently, if not always, paid for service performed on land, while the article is in the bosom of the country. Yet this tax is an exception to the prohibition on the States to lay duties on imports or exports. The exception was made because the tax would otherwise have been within the prohibition.

If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words proves that, in the opinion of the lawgiver, the thing excepted would be within

Rule of interpretation applicable to the Constitution.

the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the Constitution as to other instruments. If it be applicable, then this exception in favor of duties for the support of inspection laws goes far in proving that the framers of the Constitution classed taxes of a similar character with those imposed for the purposes of inspection with duties on imports and exports, and supposed them to be prohibited.

If we quit this narrow view of the subject, and, passing from the literal interpretation of the words, look to the objects of the prohibition, we find no reason for withdrawing the act under consideration from its operation.

From the vast inequality between the different States of the Confederacy, as to commercial advantages, few subjects were viewed with deeper interest, or excited more irritation, than the manner in which the several States exercised, or seemed disposed to exercise, the power of laying duties on imports. From motives which were deemed sufficient by the statesmen of that day, the general power of taxation, indispensably necessary as it was, and jealous as the States were of any encroachment on it, was so far abridged as to forbid them to touch imports or exports, with the single exception which has been noticed.

Why States are restrained from imposing these duties.

Why are they restrained from imposing these duties? Plainly, because, in the general opinion, the interest of all would be best promoted by placing that whole subject under the control of Congress. Whether the prohibition to "lay imposts, or duties on imports or exports" proceeded from an apprehension that the power might be so exercised as to disturb that equality among the States which was generally advantageous, or that

harmony between them which it was desirable to preserve, or to maintain unimpaired our commercial connections with foreign nations, or to confer this source of revenue on the government of the Union, or whatever other motive might have induced the prohibition, it is plain that the object would be as completely defeated by a power to tax the article in the hands of the importer the instant it was landed as by a power to tax it while entering the port. There is no difference, in effect, between a power to prohibit the sale of an article and a power to prohibit its introduction into the

No difference between power to prohibit a sale of an article and power to prohibit its introduction into the country.

country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold. No object of any description can be accomplished by laying a duty on importation which may not be accomplished with equal certainty by laying a duty on the thing imported in the hands of the importer. It is obvious that the same power which imposes a light duty can impose a very heavy one, one which amounts to a prohibition. Questions of power do not depend on the degree to which it may be exercised. If it may be ex-

Questions of power do not depend on the degree to which it may be exercised.

exercised at all, it must be exercised at the will of those in whose hands it is placed. If the tax may be levied in this form by a State, it may be levied to an extent which will defeat the revenue by impost, so far as it is drawn from importations into the particular State. We are told that such wild and irrational abuse of power is not to be apprehended, and is not to be taken into view when discussing its existence. All power may be abused; and if the fear of its abuse is to constitute an argument against its existence, it might be urged against the existence of

that which is universally acknowledged, and which is indispensable to the general safety. The States will never be so mad as to destroy their own commerce, or even to lessen it.

We do not dissent from these general propositions. We do not suppose any State would act so unwisely. But we do not place the question on that ground.

These arguments apply with precisely the same force against the whole prohibition. It might, with the same reason, be said that no State would be so blind to its own interests as to lay duties on importation which would either prohibit or diminish its trade. Yet the framers of our Constitution have thought this a power which no State ought to exercise. Conceding, to the full extent

Every State would provide judiciously for itself; it might not respect the interests of others.

which is required, that every State would, in its legislation on this subject, provide judiciously for its own interests, it cannot be conceded that each would respect the interests of others. A duty on imports is a tax on the article, which is paid by the consumer. The great importing States would thus levy a tax on the non-importing States, which would not be less a tax because their interest would afford ample security against its ever being so heavy as to expel commerce from their ports. This would necessarily produce countervailing measures on the part of those States whose situation was less favorable to importation. For this, among other reasons, the whole power of laying duties on imports was, with a single and slight exception, taken from the States. When we are inquiring whether a particular act is within this prohibition, the question is not whether the State may so legislate as to hurt itself, but whether the act is within the words and mischief of the

prohibitory clause. It has already been shown that a tax on the article in the hands of the importer is within its words; and we think it too clear for controversy that the same tax is within its mischief. We think it unquestionable that such a tax has precisely the same tendency to enhance the price of the article as if imposed upon it while entering the port.

The counsel for the State of Maryland insists, with great reason, that, if the words of the prohibition be taken in their utmost latitude, they will abridge the power of taxation, which all admit to be essential to the States, to an extent which has never yet been suspected,

Point made by counsel for State as to abridging State's powers of taxation.

and will deprive them of resources which are necessary to supply revenue, and which they have heretofore been admitted to possess. These words must, therefore, be construed with some limitation; and, if this be admitted, they insist that entering the country is the point of time when the prohibition ceases, and the power of the State to tax commences.

It may be conceded that the words of the prohibition ought not to be pressed to their utmost extent; that, in our complex system, the object of the powers conferred on the government of the Union, and the nature of the often conflicting powers which remain in the States, must always be taken into view, and may aid in expounding the words of any particular clause. But while we admit that sound principles of construction ought to restrain all courts from carrying the words of the prohibition beyond the object the Constitution is intended to secure, that there must be a point of time when the prohibition ceases and the power of the State to tax commences; we cannot admit that this point of time is

the instant that the articles enter the country. It is, we think, obvious that this construction would defeat the prohibition.

The constitutional prohibition on the States to lay a duty on imports, a prohibition which a vast majority of them must feel an interest in preserving, may certainly come in conflict with their acknowledged power to tax persons and property within their territory. The power, and the restriction on it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state

When taxing power of State commences.

any rule as being universal in its application. It is sufficient, for the present, to say, generally, that, when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has, perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution.

The counsel for the plaintiffs in error contend that the importer purchases, by payment of the duty to the United States, a right to dispose of his merchandise, as well as to bring it into the country; and certainly the argument is supported by strong reason, as well as by the practice of nations, including our own. The object of importation is sale; it

Contention by counsel for the importer.

constitutes the motive for paying the duties; and if the United States possess the power of conferring the right to sell, as the consideration for which the duty is paid, every principle of fair dealing requires that they should be understood to confer it. The practice of the most commercial nations conforms to this idea. Duties, according to that practice, are charged on those articles only which are intended for sale or consumption in the country. Thus, sea-stores, goods imported and re-exported in the same vessel, goods landed and carried over land for the purpose of being re-exported from some other port, goods forced in by stress of weather, and landed, but not for sale, are exempted from the payment of duties. The whole course of legislation on the subject shows that, in the opinion of the Legislature, the right to sell is connected with the payment of duties.

The counsel for the defendant in error have endeavored to illustrate their proposition, that the constitutional prohibition ceases the instant the goods enter the country, by an array of the consequences which they suppose must follow the denial of it. If the importer acquires the right to sell by the payment of duties, he may, they say, exert that right when, where, and as he pleases, and the State cannot regulate it. He may sell by retail, at auction, or as an itinerant peddler. He may introduce articles, as gunpowder, which endanger a city, into the midst of its population; he may introduce articles which endanger the public health, and the power of self-preservation is denied. An importer may bring in goods, as plate, for his own use, and thus retain much valuable property exempt from taxation.

These objections to the principle, if well founded, would certainly be entitled to serious consideration.

But we think they will be found, on examination, not to belong necessarily to the principle, and, consequently, not to prove that it may not be resorted to with safety as a criterion by which to measure the extent of the prohibition.

This indictment is against the importer, for selling a package of dry-goods in the form in which it was imported, without a license. This state of things is changed, if he sells them or otherwise mixes them with the general property of the State, by breaking up his packages, and traveling with them as an itinerant peddler. In the first case the tax intercepts the import, as an import in its way to become incorporated with the general mass of property, and denies it the privilege of becoming so incorporated until it shall have contributed to the revenue of the State. It denies to the importer the right of using the privilege which he has purchased from the United States until he shall have also purchased it from the State. In the last cases the tax finds the article already incorporated with the mass of property by the act of the importer. He has used the privilege he had purchased, and has himself mixed them up with the common mass, and the law may treat them as it finds them. The same observations apply to plate, or other furniture used by the importer.

So if he sells by auction. Auctioneers are persons licensed by the State, and if the importer chooses to employ them, he can as little object to paying for this service as for any other for which he may apply to an officer of the State. The right of sale may very well be annexed to importation, without annexing to it, also, the privilege of using the

Original-package doctrine.

Sales by auction.

officers licensed by the State to make sales in a peculiar way.

The power to direct the removal of gunpowder is a branch of the police power, which unquestionably remains, and ought to remain, with the States. Police power of the States. If the possessor stores it himself out of town, the removal cannot be a duty on imports, because it contributes nothing to the revenue. If he prefers placing it in a public magazine, it is because he stores it there, in his own opinion, more advantageously than elsewhere. We are not sure that this may not be classed among inspection laws. The removal or destruction of infectious or unsound articles is, undoubtedly, an exercise of that power, and forms an express exception to the prohibition we are considering. Indeed, the laws of the United States expressly sanction the health laws of a State.

The principle, then, for which the plaintiffs in error contend, that the importer acquires a right not only to bring the articles into the country, but to mix them with the common mass of property, does not interfere with the necessary power of taxation, which is acknowledged to reside in the States, to that dangerous extent which the counsel for the defendants in error seem to apprehend. It carries the prohibition in the Constitution no farther than to prevent the States from doing that which it was the great object of the Constitution to prevent.

But if it should be proved that a duty on the article itself would be repugnant to the Constitution, it is still argued that this is Not an occupation tax. not a tax upon the article, but on the person. The State, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or is a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in like manner, a tax on importation. It must add to the price of the article, and be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not a right to do, because it is prohibited by the Constitution.

In support of the argument that the prohibition ceases the instant the goods are brought into the country, a comparison has been drawn between the opposite words "export" and "import." As "to export," it is said, means only to carry goods out of the country, so "to import" means only to bring them into it. But suppose we extend this comparison to the two prohibitions. The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or duty on articles exported from any State.¹ There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to

¹ Article I, section 9: "No tax or duty shall be laid on articles exported from any State."

tax occupations which is possessed by the States. Now, suppose the United States should require every exporter to take out a license, for which he should pay such tax as Congress might think proper to impose; would the government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the Constitution would expose it, by saying that this was a tax on the person, not on the article, and that the Legislature had a right to tax occupations? Or, suppose revenue cutters were to be stationed off the coast for the purpose of levying a duty on all merchandise found in vessels which were leaving the United States for foreign countries; would it be received as an excuse for this outrage, were the government to say that exportation meant no more than carrying goods out of the country, and as the prohibition to lay a tax on imports, or things imported, ceased the instant they were brought into the country, so the prohibition to tax articles exported ceased when they were carried out of the country?

We think, then, that the act under which the plaintiffs in error were indicted is repugnant to that article of the Constitution which declares that "no State shall lay any imposts, or duties on imports or exports."

Maryland act is repugnant to the Constitution.

2. Is it also repugnant to that clause in the Constitution which empowers "Congress to regulate commerce with foreign nations, and among the several States, and with the Indian tribes?"

The oppressed and degraded state of commerce previous to the adoption of the Constitution can scarcely be forgotten. It was regulated by foreign nations with a single view to their own interests, and our disunited efforts to counteract their restric-

Origin and reasons for the commerce clause.

tions were rendered impotent by want of combination. Congress, indeed, possessed the power of making treaties; but the inability of the Federal Government to enforce them had become so apparent as to render that power in a great degree useless. Those who felt the injury arising from this state of things, and those who were capable of estimating the influence of commerce on the prosperity of nations, perceived the necessity of giving the control over this important subject to a single government. It may be doubted whether any of the evils proceeding from the feebleness of the Federal Government contributed more to that great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress. It is not, therefore, matter of surprise that the grant should be as extensive as the mischief, and should comprehend all foreign commerce, and all commerce among the States. To construe the power so as to impair its efficacy would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity.

What, then, is the just extent of a power to regulate commerce with foreign nations and among the several States?

This question was considered in the case of *Gibbons v.*

Ogden,¹ in which it was declared to be complete in itself, and to acknowledge no limitations other than are prescribed by the Constitution. The power is co-extensive with the subject on which it acts and cannot be stopped at the external boundary of a State, but must enter its interior.

We deem it unnecessary now to reason in support of these propositions. Their truth is proved by facts con-

Extent of power to regulate commerce.

¹ 9 Wheaton, 1. See same case in the present volume, *ante*, p. 428.

tinually before our eyes, and was, we think, demonstrated, if they could require demonstration, in the case already mentioned.

If this power reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell.

If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation, and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed, if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?

What would be the language of a foreign government, which should be informed that its merchants, after im-

porting according to law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such an extraordinary circumstance would expose them? No apology could be received, or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the States is a sufficient security against it. The Constitution has not confided this subject to that good sense. It is placed elsewhere. The question is, Where does the power reside? not, How far will it be, probably, abused? The power claimed by the State is, in its nature, in conflict with that given to Congress; and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence.

We think, then, that, if the power to authorize a sale exists in Congress, the conclusion, that
Power to import implies power to sell. the right to sell is connected with the law permitting importation, as an inseparable incident, is inevitable.

If the principles we have stated be correct, the result to which they conduct us cannot be mistaken. Any penalty inflicted on the importer for selling the article, in his character of importer, must be in opposition to the act of Congress which authorizes importation. Any charge on the introduction and incorporation of the articles into and with the mass of property in the country must be hostile to the power given to Congress to regulate commerce, since an essential part of that regulation, and principal object of it, is to prescribe the regular means for accomplishing that introduction and incorporation.

The distinction between a tax on the thing imported and on the person of the importer can have no influence on this part of the subject. It is too obvious for controversy that they interfere equally with the power to regulate commerce.

Distinction between tax on article and tax on person is here immaterial.

It has been contended that this construction of the power to regulate commerce, as was contended in construing the prohibition to lay duties on imports, would abridge the acknowledged power of a State to tax its own citizens, or their property within its territory.

We admit this power to be sacred, but cannot admit that it may be used so as to obstruct the free course of a power given to Congress. We cannot admit that it may be used so as to obstruct or defeat the power to regulate commerce. It has been observed that the powers remaining with the States may be so exercised as to come in conflict with those vested in Congress. When this happens, that which is not supreme must yield to that which is supreme. This great and universal truth is inseparable from the nature of things, and the Constitution has applied it to the often interfering powers of the General and State governments, as a vital principle of perpetual operation. It results, necessarily, from this principle that the taxing power of the States must have some limits. It cannot reach and restrain the action of the National Government within its proper sphere. It cannot reach the administration of justice in the courts of the Union, or the collection of the taxes of the United States, or restrain the operation of any law which Congress may constitutionally pass. It cannot interfere with any regulation of commerce. If the States may tax all per-

Commerce and other clauses limit State's power of taxation.

sons and property found on their territory, what shall restrain them from taxing goods in their transit through the State from one port to another for the purpose of re-exportation? The laws of trade authorize this operation, and general convenience requires it. Or what should restrain a State from taxing any article passing through it from one State to another, for the purpose of traffic? or from taxing the transportation of articles passing from the State itself to another State for commercial purposes? These cases are all within the sovereign power of taxation, but would obviously derange the measures of Congress to regulate commerce, and affect materially the purpose for which that power was given. We deem it unnecessary to press this argument farther, or to give additional illustrations of it, because the subject was taken up, and considered with great attention, in *M'Culloch v. The State of Maryland*,¹ the decision in which case is, we think, entirely applicable to this.

M'Culloch v. Maryland
in point.

It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State. We do not mean to give any opinion on a tax discriminating between foreign and domestic articles.

We think there is error in the judgment of the Court of Appeals of the State of Maryland in affirming the judgment of the Baltimore City Court, because the act of the Legislature of Maryland, imposing the penalty for which the said judgment is rendered, is repugnant to the Constitution of the United States, and, consequently, void. The judgment is to be reversed, and the cause remanded to that court, with instructions to enter judgment in favor of the appellants.

State court judgment
reversed.

¹ 4 Wheaton, 316; same case, *ante*, p. 252.

NOTE.

"The doctrine of *Brown v. Maryland* has been steadily followed since, and has been applied to commerce 'among the several States,' commonly known as interstate commerce." *Miller, Const. of U. S.* 268, 269.

In the *Reading Railroad Company v. Pennsylvania*, commonly called the case of "State Tax on Railway Gross Receipts" (15 Wall. 284, 299), Mr. Justice Miller said: "I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce." Mr. Justice Bradley says: "No State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, and the reason is that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress. This is the result of so many recent cases that citation is hardly necessary." *Leloup v. Port of Mobile*, 127 U. S. 640, 648.

"The power to license and regulate particular branches of business or matters is usually a police power, but when license fees or exactions are plainly imposed for the sole or main purpose of revenue, they are, in effect, taxes." *Dillon on Mun. Corp.*, sec. 768; s. p., *Cooley, Const. Lim.* 242 (6th ed.); *Cooley on Taxation*, 597, 598 (2d ed.).

Where the State of Missouri passed a statute purporting to regulate the driving of cattle into its territory, this court said: "It (a State) may not under the cover of exerting its police power substantially prohibit or burden either foreign or interstate commerce. . . . The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal Constitution. And as its range sometimes comes very near to the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any needless intrusion."

Hannibal & St. J. R. R. Co. *v.* Husen, 95 U. S. 465, 472, 473; and the reasoning of this case has been since followed in *Minnesota v. Barber*, 136 U. S. 313; *Brimmer v. Rebman*, 138 U. S. 78; *Cotting v. Kansas City Stock Yards Co., etc.*, 183 U. S. 79; *St. Louis, etc. Coal Co. v. Illinois*, 185 U. S. 203. Interstate commerce cannot be taxed at all by the State, and the fact that the tax is imposed by a law or an ordinance purporting to be an enforcement of the police power, or a privilege tax, can make no difference in the application of the rule. *Robbins v. Shelby Taxing District*, 120 U. S. 489. And this has been reaffirmed in *Asher v. Texas*, 128 U. S. 129; *Stoutenburgh v. Hennick*, 129 U. S. 141; *McCall v. California*, 136 U. S. 104; *Brennan v. Titusville*, 153 U. S. 289.

In *New Orleans Gas Co. v. Louisiana Light Co.*, 115 U. S. 650, 661, Mr. Justice Harlan said: "Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the General Government or rights granted or secured by the supreme law of the land.

"Even if it be that we are concluded by the opinion of the Supreme Court of the State that this ordinance was enacted in the exercise of the police power, we are still confronted with the difficult question as to how far an act held to be a police regulation, but which in fact affects interstate commerce, can be sustained. It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." Per Brewer, J., in *Brennan v. Titusville*, 153 U. S. 289, 302.

"To what extent the police power of a State may be exerted on traffic and intercourse with the State without conflicting with the commerce clause of the Constitution of the United States has not been precisely defined. In the case of *Henderson v. Mayor of New York*, 92 U. S.

259, it was held that the statute of the State, which, aiming to secure indemnity against persons coming from foreign countries becoming a charge upon the State, required ship-owners to pay a fixed sum for each passenger — that is, to pay for all passengers — not limiting the payment to those who might actually become such charge was void. Whether the statute would have been valid if so limited was not decided." Per McKenna, J., *Smith v. St. Louis & S. W. Ry. Co.*, 181 U. S. 248, 253.

State regulations incidentally relating to or affecting commerce are valid provided always they do not burden commerce or conflict with the Constitution, laws, or treaties of the United States. Judge Cooley (Const. Lim., p. 586) well remarks that, "The line of distinction between that which constitutes an interference with commerce and that which is a mere police regulation is sometimes exceedingly dim and shadowy," and a precise and accurate view of this subject as well as of the kindred subject of State taxation of commerce, and of its instrumentalities, can only be had by a careful study of the many adjudications of the Supreme Court relating thereto.

In the very recent case of the Atlantic, etc. Telegraph Company *v. Philadelphia*, 190 U. S. 160 (1903), the power of taxation by the States and their municipalities was carefully considered, and from the numerous cases on the subject Mr. Justice Brewer deduced and stated certain fundamental propositions substantially covering the whole subject, and which it was declared "had been adjudicated so often as to be no longer open to discussion." These are given in the notes to *M'Culloch v. Maryland*, *ante*, pp. 253-255, to which the reader is referred. See also *Gibbons v. Ogden*, *ante*, pp. 421-467, and notes; *M'Culloch v. Maryland*, *ante*, pp. 252-298, and notes; Judson on Taxation, chapters III-VII; Russell on Police Power of the States, chapter VIII; Von Holst, Const. Law of U. S., 136 *et seq.*, and notes.

The police power of the States in connection with the Federal power over commerce is treated by Judge Cooley: Constitutional Limitations, chapter XVI, 572-586. Also the subject of the Taxation by the States of Commerce and of Federal Instrumentalities. *Id.* 480-486, 586.

REFERENCES TO BROWN v. STATE OF MARYLAND, IN
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CONSTITUTIONAL VALIDITY OF STATE INSOLVENT AND BANKRUPT LAWS.

The opinion of Chief Justice Marshall in the next case—*Ogden v. Saunders*—is a dissenting opinion embodying the views of himself and Justices Story and Duvall on the question as to the validity of State insolvent laws providing for the discharge of a debtor, as respects contracts made *after* the enactment of such laws.

The reader is referred to the case of *Sturges v. Crowninshield* (*ante*, pp. 226–251), and to the prefatory and other notes thereto, on the general subject of State insolvent and bankrupt laws, and with respect to the conflicting judgments of eminent lawyers concerning the soundness of the conclusions of Chief Justice Marshall expressed in the following opinion. It is perhaps not too much to say that experience has confirmed the wisdom of Marshall's views, and that the preponderating judgment of the profession is that these views are, at least so far as respects the discharge of debtors from their contracts, a sound exposition of the Constitution.¹

Ogden v. Saunders.

January Term, 1827.

[12 Wheaton's Reports, 213–369.]

The proposition of law decided by the majority of the court is thus stated by Mr. Justice Curtis in his edition of *Decisions of the Supreme Court of the United States*:

An insolvent law of a State does not impair the obligation of future contracts between its citizens. But it cannot affect the rights of creditors who are citizens of other States.

¹ See *ante*, p. 227, and notes at the end of this case, *post*, p. 584.

The propositions of law maintained in the following dissenting opinion are summarized by the Chief Justice near the close of the opinion (*post*, pp. 580, 581).

Ogden resided in New York, Saunders in Kentucky; Saunders drew on Ogden certain bills of exchange, which were accepted in New York, but not paid. Ogden obtained a discharge under the insolvent law of New York which existed when the bills were accepted, and afterwards moved to Louisiana; there he was sued by Saunders in the United States District Court. He pleaded in defense his discharge under the New York statute. The defense was held insufficient, and Saunders recovered judgment for his debt. Thereupon Ogden brought the case by due process of law to the Supreme Court of the United States.¹

The question which arose under Ogden's plea as to the validity of the law of New York as being repugnant to the Constitution of the United States was argued at February term, 1824, by Mr. Henry Clay, Mr. D. B. Ogden and Mr. Haines for the plaintiff in error, and by Mr. Daniel Webster and Mr. Henry Wheaton for the defendant in error, and the cause was continued for advisement until the January term, 1827. It was then again argued (in connection with several other causes on the calendar, and involving the general question of the valid-

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice*,
 BUSHROD WASHINGTON,
 WILLIAM JOHNSON,
 GABRIEL DUVALL,
 JOSEPH STORY,
 SMITH THOMPSON,
 ROBERT TRIMBLE,

} *Associate Justices.*

Justice Trimble was appointed May 9, 1826.

ity of the State bankrupt or insolvent laws) by Mr. Daniel Webster and Mr. Henry Wheaton against the validity, and by Attorney-General William Wirt, Mr. Edward Livingston, Mr. D. B. Ogden, Mr. Walter Jones and Mr. Sampson for the validity.

Upon the question, Whether a State insolvent law which provides for a discharge of the debtor from his contract, if applied to contracts made *after* the passage of such insolvent law, impairs the obligation of such subsequent contracts, Justices Washington, Johnson, Trimble and Thompson (being a majority of the court) held that the State law thus limited was valid. On this proposition Marshall, C. J., Story and Duvall, JJ., dissented. The following is the dissenting opinion as delivered by the Chief Justice:

MARSHALL, Chief Justice. It is well known that the court has been divided in opinion on this case. Three judges, Mr. Justice Duvall, Dissenting opinion. Mr. Justice Story, and myself, do not concur in the judgment which has been pronounced. We have taken a different view of the very interesting question which has been discussed with so much talent, as well as labor, at the bar, and I am directed to state the course of reasoning on which we have formed the opinion that the discharge pleaded by the defendant is no bar to the action.

The single question for consideration is, whether the act of the State of New York is consistent with or repugnant to the Constitution of the United States?

This court has so often expressed the sentiments of profound and respectful reverence with which it approaches questions of this character as to make it

unnecessary now to say more than that if it be right that the power of preserving the Constitution from legislative infraction should reside anywhere, it cannot be wrong, it must be right, that those on whom the delicate and important duty is conferred should perform it according to their best judgment.

Much, too, has been said concerning the principles of construction which ought to be applied to the Constitution of the United States.

On this subject, also, the court has taken such frequent occasion to declare its opinion as to make it unnecessary, at least, to enter again into an elaborate discussion of it. To say that the intention of the instrument must prevail; that this intention must be collected from its words; that its words are to be understood in that sense in which they are generally used by those for whom the instrument was intended; that its provisions are neither to be restricted into insignificance, nor extended to objects not comprehended in them, nor contemplated by its framers, is to repeat what has been already said more at large, and is all that can be necessary.

As preliminary to a more particular investigation of the clause in the Constitution on which the case now under consideration is supposed to depend, it may be proper to inquire how far it is affected by the former decisions of this court.

In *Sturges v. Crowninshield* it was determined that an act which discharged the debtor from a contract entered into previous to its passage was repugnant to the Constitution. The reasoning which conducted the court to that conclusion might, perhaps, conduct it farther; and with that reasoning (for myself alone this expression

Sturges v. Crowninshield distinguished from *Ogden v. Saunders*.

is used) I have never yet seen cause to be dissatisfied. But that decision is not supposed to be a precedent for *Ogden v. Saunders*, because the two cases differ from each other in a material fact; and it is a general rule, expressly recognized by the court in *Sturges v. Crowninshield*, that the positive authority of a decision is co-extensive only with the facts on which it is made. In *Sturges v. Crowninshield* the law acted on a contract which was made before its passage; in this case the contract was entered into after the passage of the law.

In *M'Millan v. M'Neil*¹ the contract, though subsequent to the passage of the act, was made in a different State, by persons residing in that State, and, consequently, without any view to the law the benefit of which was claimed by the debtor.

The Farmers' and Mechanics' Bank of Pennsylvania *v. Smith*² differed from *Sturges v. Crowninshield* only in this: that the plaintiff and defendant were both residents of the State in which the law was enacted, and in which it was applied. The court was of opinion that this difference was unimportant.

It has, then, been decided that an act which discharges the debtor from pre-existing contracts is void; and that an act which operates on future contracts is inapplicable to a contract made in a different State, at whatever time it may have been entered into.

Neither of these decisions comprehends the question now presented to the court. It is, consequently, open for discussion.

The provision of the Constitution is that "no State shall pass any law" "impairing the obligation of contracts." The plaintiff in error contends that this provis-

¹ 4 Wheaton, 209.

² 6 Wheaton, 131.

ion inhibits the passage of retrospective laws only,—of such as act on contracts in existence at their passage. The defendant in error maintains that it comprehends all future laws, whether prospective or retrospective, and withdraws every contract from State legislation the obligation of which has become complete.

That there is an essential difference in principle between laws which act on past and those which act on future contracts; that those of the first description can seldom be justified, while those of the last are proper subjects of ordinary legislative discretion, must be admitted. A constitutional restriction, therefore, on the power to pass laws of the one class may very well consist with entire legislative freedom respecting those of the other. Yet, when we consider the nature of our Union; that it is intended to make us, in a great measure, one people, as to commercial objects; that, so far as respects the intercommunication of individuals, the lines of separation between States are, in many respects, obliterated,—it would not be matter of surprise, if, on the delicate subject of contracts once formed, the interference of State legislation should be greatly abridged, or entirely forbidden. In the nature of the provision, then, there seems to be nothing which ought to influence our construction of the words; and, in making that construction, the whole clause, which consists of a single sentence, is to be taken together, and the intention is to be collected from the whole.

The first paragraph of the tenth section of the first article, which comprehends the provision under consideration, contains an enumeration of those cases in which the action of the State Legislature is entirely prohibited.

Difference in principle between laws which act on past and those which act on future contracts.

The second enumerates those in which the prohibition is modified. The first paragraph, consisting of total prohibitions, comprehends Two classes of prohibition — absolute and modified. two classes of powers. Those of the first are political and general in their nature, being an exercise of sovereignty without affecting the rights of individuals. These are the powers “to enter into any treaty, alliance, or confederation, grant letters of marque or reprisal, coin money, emit bills of credit.”

The second class of prohibited laws comprehends those whose operation consists in their action on individuals. These are laws which make anything but gold and silver coin a tender in payment of debts, bills of attainder, *ex post facto* laws, or laws impairing the obligation of contracts, or which grant any title of nobility.

In all these cases, whether the thing prohibited be the exercise of mere political power, or legislative action on individuals, the prohibition is complete and total. There is no exception from it. Legislation of every description is comprehended within it. A State is as entirely forbidden to pass laws impairing the obligation of contracts as to make treaties or coin money. The question recurs, What is a law impairing the obligation of contracts?

In solving this question, all the acumen which controversy can give to the human mind has been employed in scanning the whole sentence, and every word of it. Arguments have been drawn from the context, and from the particular terms in which the prohibition is expressed, for the purpose, on the one part, of showing its application to all laws which act upon contracts, whether prospectively or retrospectively; and, on the other, of limiting it to laws which act on contracts previously formed.

The first impression which the words make on the

mind would probably be, that the prohibition was intended to be general. A contract is commonly understood to be the agreement of the parties; and, if it be not illegal, to bind them to the extent of their stipulation. It requires reflection, it requires some intellectual effort, to efface this impression, and to come to the conclusion that the words "contract" and "obligation," as used in the Constitution, are not used in this sense. If, however, the result of this mental effort, fairly made, be the correction of this impression, it ought to be corrected.

So much of this prohibition as restrains the power of the States to punish offenders in criminal cases, the prohibition to pass bills of attainder and *ex post facto* laws, is, in its very terms, confined to pre-existing cases. A bill of attainder can be only for crimes already committed; and a law is not *ex post facto* unless it looks back to an act done before its passage. Language is incapable of expressing in plainer terms that the mind of the convention was directed to retroactive legislation. The thing forbidden is retroaction. But that part of the clause which relates to the civil transactions of individuals is expressed in more general terms; in terms which comprehend, in their ordinary signification, cases which occur after, as well as those which occur before, the passage of the act. It forbids a State to make anything but gold and silver coin a tender in payment of debts, or to pass any law impairing the obligation of contracts. These prohibitions relate to kindred subjects. They contemplate legislative interference with private rights, and restrain that interference. In construing that part of the clause which respects tender laws, a distinction has never been attempted between debts existing at the

time the law may be passed and debts afterwards created. The prohibition has been considered as total; and yet the difference in principle between making property a tender in payment of debts contracted after the passage of the act and discharging those debts without payment or by the surrender of property, between an absolute right to tender in payment, and a contingent right to tender in payment or in discharge of the debt, is not clearly discernible. Nor is the difference in language so obvious as to denote plainly a difference of intention in the framers of the instrument. "No State shall make anything but gold and silver coin a tender in payment of debts." Does the word "debts" mean, generally, those due when the law applies to the case, or is it limited to debts due at the passage of the act? The same train of reasoning which would confine the subsequent words to contracts existing at the passage of the law would go far in confining these words to debts existing at that time. Yet this distinction has never, we believe, occurred to any person. How soon it may occur is not for us to determine. We think it would, unquestionably, defeat the object of the clause.

The counsel for the plaintiff insist that the word "impairing," in the present tense, limits the signification of the provision to the operation of the act at the time of its passage; that no law can be accurately said to impair the obligation of contracts unless the contracts exist at the time. The law cannot impair what does not exist. It cannot act on nonentities.

There might be weight in this argument if the prohibited laws were such only as operated of themselves, and immediately on the contract. But insolvent laws

are to operate on a future, contingent, unforeseen event.

Insolvent laws operate on a future event.

The time to which the word "impairing" applies is not the time of the passage of the act, but of its action on the contract; that is, the time present in contemplation of the prohibition. The law, at its passage, has no effect whatever on the contract. Thus, if a note be given in New York for the payment of money, and the debtor removes out of that State into Connecticut, and becomes insolvent, it is not pretended that his debt can be discharged by the law of New York. Consequently, that law did not operate on the contract at its formation. When, then, does its operation commence? We answer, when it is applied to the contract. Then, if ever, and not till then, it acts on the contract, and becomes a law impairing its obligation. Were its constitutionality, with respect to previous contracts, to be admitted, it would not impair their obligation until an insolvency should take place, and a certificate of discharge be granted. Till these events occur, its impairing faculty is suspended. A law, then, of this description, if it derogates from the obligation of a contract, when applied to it, is, grammatically speaking, as much a law impairing that obligation, though made previous to its formation, as if made subsequently.

A question of more difficulty has been pressed with great earnestness. It is: What is the original obligation of a contract made after the passage of such an act as the insolvent law of New York? Is it unconditional, to perform the very thing stipulated? or is the condition implied, that, in the event of insolvency, the contract shall be satisfied by the surrender of property? The original obligation, whatever that may be, must be preserved

What is the original obligation of a contract after the passage of an insolvent law?

by the Constitution. Any law which lessens must impair it.

All admit that the Constitution refers to and preserves the legal, not the moral, obligation of a contract. Obligations purely moral are to be enforced by the operation of internal and invisible agents, not by the agency of human laws. The restraints imposed on States by the Constitution are intended for those objects which would, if not restrained, be the subject of State legislation. What, then, was the original legal obligation of the contract now under the consideration of the court?

The plaintiff in error insists that the law enters into the contract so completely as to become a constituent part of it; that it is to be construed as if it contained an express stipulation to be discharged, ^{Idem.} should the debtor become insolvent, by the surrender of all his property for the benefit of his creditors, in pursuance of the act of the Legislature.

This is, unquestionably, pressing the argument very far; and the establishment of the principle leads inevitably to consequences which would affect society deeply and seriously.

Had an express condition been inserted in the contract, declaring that the debtor might be discharged from it at any time by surrendering all his property to his creditors, this condition would have bound the creditor. It would have constituted the obligation of his contract; and a legislative act annulling the condition would impair the contract. Such an act would, as is admitted by all, be unconstitutional, because it operates on pre-existing agreements. If a law authorizing debtors to discharge themselves from their debts by surrendering their property enters into the contract, and forms a

part of it, if it is equivalent to a stipulation between the parties, no repeal of the law can affect contracts made during its existence. The effort to give it that effect would impair their obligation. The counsel for the plaintiff perceive and avow this consequence, in effect, when they contend that to deny the operation of the law on the contract under consideration is to impair its obligation. Are gentlemen prepared to say that an insolvent law, once enacted, must, to a considerable extent, be permanent? that the Legislature is incapable of varying it so far as respects existing contracts?

So, too, if one of the conditions of an obligation for the payment of money be that, on the insolvency of the obligor, or on any event agreed on by the parties, he should be at liberty to discharge it by the tender of all or part of his property, no question could exist respecting the validity of the contract, or respecting its security from legislative interference. If it should be determined that a law authorizing the same tender, on the same contingency, enters into and forms a part of the contract, then a tender law, though expressly forbidden, with an obvious view to its prospective as well as retrospective operation, would, by becoming the contract of the parties, subject all contracts made after its passage to its control. If it be said that such a law would be obviously unconstitutional and void, and, therefore, could not be a constituent part of the contract, we answer that, if the insolvent law be unconstitutional, it is equally void, and equally incapable of becoming, by mere implication, a part of the contract. The plainness of the repugnancy does not change the question. That may be very clear to one intellect which is far from being so to another. The law now under consideration is, in the

opinion of one party, clearly consistent with the Constitution, and, in the opinion of the other, as clearly repugnant to it. We do not admit the correctness of that reasoning which would settle this question by introducing into the contract a stipulation not admitted by the parties.

This idea admits of being pressed still farther. If one law enters into all subsequent contracts, so does every other law which relates to the subject. A legislative act, then, declaring that all contracts should be subject to legislative control, and should be discharged as the Legislature might prescribe, would become a component part of every contract, and be one of its conditions. Thus one of the most important features in the Constitution of the United States, one which the state of the times most urgently required, one on which the good and the wise reposed confidently for securing the prosperity and harmony of our citizens, would lie prostrate, and be construed into an inanimate, inoperative, unmeaning clause.

Gentlemen are struck with the enormity of this result, and deny that their principle leads to it. They distinguish, or attempt to distinguish, between the incorporation of a general law, such as has been stated, and the incorporation of a particular law, such as the insolvent law of New York, into the contract. But will reason sustain this distinction? They say that men cannot be supposed to agree to so indefinite an article as such a general law would be, but may well be supposed to agree to an article, reasonable in itself, and the full extent of which is understood.

Attempt to distinguish between a general law and a particular law.

But the principle contended for does not make the insertion of this new term or condition into the contract

to depend upon its reasonableness. It is inserted because the Legislature has so enacted. If the enactment of the Legislature becomes a condition of the contract because it is an enactment, then it is a high prerogative, indeed, to decide that one enactment shall enter the contract, while another, proceeding from the same authority, shall be excluded from it.

The counsel for the plaintiff illustrates and supports this position by several legal principles, and by *Idem.* some decisions of this court, which have been relied on as being applicable to it.

The first case put is interest on a bond payable on demand which does not stipulate interest. This, he says, is not a part of the remedy, but a new term in the contract.

Let the correctness of this averment be tried by the course of proceeding in such cases.

The failure to pay according to stipulation is a breach of the contract, and the means used to enforce it *Idem.* constitute the remedy which society affords the injured party. If the obligation contains a penalty, this remedy is universally so regulated that the judgment shall be entered for the penalty, to be discharged by the payment of the principal and interest. But the case on which counsel has reasoned is a single bill. In this case the party who has broken his contract is liable for damages. The proceeding to obtain those damages is as much a part of the remedy as the proceeding to obtain the debt. They are claimed in the same declaration, and as being distinct from each other. The damages must be assessed by a jury; whereas, if interest formed a part of the debt, it would be recovered as part of it. The declaration would claim it as a part of the debt; and yet, if a suitor

were to declare on such a bond as containing this new term for the payment of interest, he would not be permitted to give a bond in evidence in which this supposed term was not written. Any law regulating the proceedings of courts on this subject would be a law regulating the remedy.

The liability of the drawer of a bill of exchange stands upon the same principle with every other implied contract. He has received the money of the person in whose favor the bill is drawn, and promises that it shall be returned by the drawee. If the drawee fail to pay the bill, then the promise of the drawer is broken, and for this breach of contract he is liable. The same principle applies to the indorser. His contract is not written, but his name is evidence of his promise that the bill shall be paid, and of his having received value for it. He is, in effect, a new drawer, and has made a new contract. The law does not require that this contract shall be in writing, and, in determining what evidence shall be sufficient to prove it, does not introduce new conditions not actually made by the parties. The same reasoning applies to the principle which requires notice. The original contract is not written at large. It is founded on the acts of the parties, and its extent is measured by those acts. A. draws on B. in favor of C., for value received. The bill is evidence that he has received value, and has promised that it shall be paid. He has funds in the hands of the drawee, and has a right to expect that his promise will be performed. He has also a right to expect notice of its non-performance, because his conduct may be materially influenced by this failure of the drawee. He ought to have notice that *his* bill is disgraced, because this notice enables him to take measures for his own secu-

ality. It is reasonable that he should stipulate for this notice, and the law presumes that he did stipulate for it.

A great mass of human transactions depends upon implied contracts; upon contracts which are not written, but which grow out of the acts of the parties. In such cases the parties are supposed to have made those stipulations, which, as honest, fair and just men, they ought to have made. When the law assumes that they have made these stipulations, it does not vary their contract, or introduce new terms into it, but declares that certain acts, unexplained by compact, impose certain duties, and that the parties had stipulated for their performance. The difference is obvious between this and the introduction of a new condition into a contract drawn out in writing, in which the parties have expressed everything that is to be done by either.

The usage of banks, by which days of grace are allowed on notes payable and negotiable in bank, is of the same character. Days of grace, from their very term, originate partly in convenience, and partly in the indulgence of the creditor. By the terms of the note the debtor has to the last hour of the day on which it becomes payable to comply with it, and it would often be inconvenient to take any steps after the close of day. It is often convenient to postpone subsequent proceedings till the next day. Usage has extended this time of grace generally to three days, and in some banks to four. This usage is made a part of the contract, not by the interference of the Legislature, but by the act of the parties. The case cited from 9 Wheaton's Reports, 581,¹ is a note discounted

Difference between implied contracts and written contracts.

Days of grace — origin — an implied contract.

¹ Renner v. Bank of Columbia.

in bank. In all such cases the bank receives, and the maker of the note pays, interest for the days of grace. This would be illegal and usurious if the money was not lent for these additional days. The extent of the loan, therefore, is regulated by the act of the parties, and this part of the contract is founded on their act. Since, by contract, the maker is not liable for his note until the days of grace are expired, he has not broken his contract until they expire. The duty of giving notice to the indorser of his failure does not arise until the failure has taken place, and, consequently, the promise of the bank to give such notice is performed, if it be given when the event has happened.

The case of the *Bank of Columbia v. Oakley* (4 Wheaton's Reports, 235) was one in which the Legislature had given a summary remedy to the bank for a broken contract, and had placed that remedy in the hands of the bank itself. The case did not turn on the question whether the law of Maryland was introduced into the contract, but whether a party might not, by his own conduct, renounce his claim to the trial by jury in a particular case. The court likened it to submissions to arbitration, and to stipulation and forthcoming bonds. The principle settled in that case is, that a party may renounce a benefit, and that Oakley had exercised this right.

The cases from *Strange* and *East* turn upon a principle which is generally recognized, but which is entirely distinct from that which they are cited to support. It is, that a man who is discharged by the tribunals of his own country, acting under its laws, may plead that discharge in any other country. The principle is, that laws act upon a contract, not that they enter into it, and become a

Laws act upon a contract; they do not enter into it.

stipulation of the parties. Society affords a remedy for breaches of contract. If that remedy has been applied, the claim to it is extinguished. The external action of law upon contracts, by administering the remedy for their breach, or otherwise, is the usual exercise of legislative power. The interference with those contracts, by introducing conditions into them not agreed to by the parties, would be a very unusual and a very extraordinary exercise of the legislative power, which ought not to be gratuitously attributed to laws that do not profess to claim it. If the law becomes a part of the contract, change of place would not expunge the condition. A contract made in New York would be the same in any other State as in New York, and would still retain the stipulation originally introduced into it, that the debtor should be discharged by the surrender of his estate.

It is not, we think, true that contracts are entered into in contemplation of the insolvency of the obligor. They are framed with the expectation that they will be literally performed. Insolvency is undoubtedly a casualty which is possible, but is never expected. In the ordinary course of human transactions, if even suspected, provision is made for it by taking security against it. When it comes unlooked for, it would be entirely contrary to reason to consider it as a part of the contract.

We have, then, no hesitation in saying that, however law may act upon contracts, it does not enter into them and become a part of the agreement. The effect of such a principle would be a mischievous abridgment of legislative power over subjects within the proper jurisdiction of states by arresting their power to repeal or modify such laws with respect to existing contracts.

Contracts are not entered into generally in contemplation of insolvency of obligor.

But although the argument is not sustainable in this form, it assumes another, in which it is more plausible. Contract, it is said, Another phase of the subject considered. being the creature of society, derives its obligation from the law; and although the law may not enter into the agreement so as to form a constituent part of it, still it acts externally upon the contract, and determines how far the principle of coercion shall be applied to it; and this being universally understood, no individual can complain justly of its application to himself, in a case where it was known when the contract was formed.

This argument has been illustrated by references to the Statutes of Frauds, of Usury, and of Limitations. The construction of the words in the Constitution respecting contracts, for which the defendants contend, would, it has been said, withdraw all these subjects from State legislation. The acknowledgment that they remain within it is urged as an admission that contract is not withdrawn by the Constitution, but remains under State control, subject to this restriction only, that no law shall be passed impairing the obligation of contracts in existence at its passage.

The defendants maintain that an error lies at the very foundation of this argument. It assumes that contract is the mere creature of society, and derives all its obligation from human legislation; that it is not the stipulation an individual makes which Why contracts are binding. binds him, but some declaration of the supreme power of a State to which he belongs, that he shall perform what he has undertaken to perform; that, though this original declaration may be lost in remote antiquity, it must be presumed as the origin of the obligation of contracts. This postulate the defendants deny, and, we think, with great reason.

It is an argument of no inconsiderable weight against it that we find no trace of such an enactment. So far back as human research carries us, we find the judicial power, as a part of the executive, administering justice by the application of remedies to violated rights, or broken contracts. We find that power applying these remedies on the idea of a pre-existing obligation on every man to do what he has promised on consideration to do; that the breach of this obligation is an injury for which the injured party has a just claim to compensation, and that society ought to afford him a remedy for that injury. We find allusions to the mode of acquiring property, but we find no allusion, from the earliest time, to any supposed act of the governing power giving obligation to contracts. On the contrary, the proceedings respecting them, of which we know anything, evince the idea of a pre-existing intrinsic obligation which human law enforces. If, on tracing the right to contract, and the obligations created by contract, to their source, we find them to exist anterior to and independent of society, we may reasonably conclude that those original and pre-existing principles are, like many other natural rights, brought with man into society; and although they may be controlled are not given by human legislation.

In the rudest state of nature a man governs himself, and labors for his own purposes. That
Antiquity of contracts. which he acquires is his own, at least while in his possession, and he may transfer it to another. This transfer passes his right to that other. Hence the right to barter. One man may have acquired more skins than are necessary for his protection from the cold; another more food than is necessary for his immediate use. They agree each to supply the wants of the other

from his surplus. Is this contract without obligation? If one of them, having received and eaten the food he needed, refuses to deliver the skin, may not the other rightfully compel him to deliver it? Or two persons agree to unite their strength and skill to hunt together for their mutual advantage, engaging to divide the animal they shall master. Can one of them rightfully take the whole? or, should he attempt it, may not the other force him to a division? If the answer to these questions must affirm the duty of keeping

faith between these parties, and the Rights of contracting parties. right to enforce it if violated, the an-

swer admits the obligation of contracts, because upon that obligation depends the right to enforce them. Superior strength may give the power, but cannot give the right. The rightfulness of coercion must depend on the pre-existing obligation to do that for which compulsion is used. It is no objection to the principle that the injured party may be the weakest. In society, the wrong-doer may be too powerful for the law. He may deride its coercive power, yet his contracts are obligatory; and if society acquire the power of coercion, that power will be applied without previously enacting that his contract is obligatory.

Independent nations are individuals in a state of nature. Whence is derived the obligation of their contracts? They admit the existence of no superior legislative power which is to give them validity, yet their validity is acknowledged by all. If one of these contracts be broken, all admit the right of the injured party to demand reparation for the injury; and to enforce that reparation if it be withheld. He may not have the power to enforce it, but the whole civilized world concurs in saying that the power, if possessed, is rightfully used.

In a state of nature, these individuals may contract, their contracts are obligatory, and force may right-
Idem. fully be employed to coerce the party who has broken his engagement.

What is the effect of society upon these rights? When men unite together and form a govern-
Society has no effect on right to contract. ment, do they surrender their right to contract, as well as their right to en-

force the observance of contracts? For what purpose should they make this surrender? Government cannot exercise this power for individuals. It is better that they should exercise it for themselves. For what purpose, then, should the surrender be made? It can only be that government may give it back again. As we have no evidence of the surrender, or of the restoration of the right; as this operation of surrender and restoration would be an idle and useless ceremony, the rational inference seems to be that neither has ever been made; that indi-

Right to contract is intrinsic, not derived from government.

viduals do not derive from government their right to contract, but bring that right with them into society; that obligation is not conferred on contracts by positive law, but is intrinsic, and is conferred by the act of the parties. This results from the right which every man retains to acquire property, to dispose of that property according to his own judgment, and to pledge himself for a future act. These rights are not given by society, but are brought into it. The right of coercion is necessarily surrendered to government, and this surrender imposes on government the correlative duty of furnishing a remedy. The right to regulate contracts, to prescribe rules by which they shall be evidenced, to prohibit such as may be deemed mischievous, is unquestionable, and has been

universally exercised. So far as this power has restrained the original right of individuals to bind themselves by contract, it is restrained; but beyond these actual restraints the original power remains unimpaired.

This reasoning is, undoubtedly, much strengthened by the authority of those writers on natural and national law whose opinions have been viewed with profound respect by the wisest men of the present and of past ages.

Supposing the obligation of the contract to be derived from the agreement of the parties, we will inquire how far law acts externally on it, and may control that obligation.

How far may the law act upon the obligation of contract.

That law may have, on future contracts, all the effect which the counsel for the plaintiff in error claim, will not be denied. That it is capable of discharging the debtor, under the circumstances and on the conditions prescribed in the statute which has been pleaded in this case, will not be controverted. But as this is an operation which was not intended by the parties, nor contemplated by them, the particular act can be entitled to this operation only when it has the full force of law. A law may determine the obligation of a contract on the happening of a contingency, because it is the law. If it be not the law, it cannot have this effect. When its existence as law is denied, that existence cannot be proved by showing what are the qualities of a law. Law has been defined by a writer, whose definitions especially have been the theme of almost universal panegyric, "to be a rule of civil conduct prescribed by the supreme power in a State." In our system, the Legislature of a State is the supreme power, in all cases where its action is not

Blackstone's definition of law.

restrained by the Constitution of the United States. Where it is so restrained, the Legislature ceases to be the supreme power, and its acts are not law. It is, then, begging the question to say that, because contracts may be discharged by a law previously enacted, this contract may be discharged by this act of the Legislature of New York; for the question returns upon us, Is this act a law? Is it consistent with, or repugnant to, the Constitution of the United States? This question is to be solved only by the Constitution itself.

In examining it, we readily admit that the whole subject of contracts is under the control of society, and that all the power of society over it resides in the State Legislatures, except in those special cases where restraint is imposed by the Constitution of the United States. The particular restraint now under consideration is on the power to impair the obligation of contracts. The extent of this restraint cannot be ascertained by showing that the Legislature may prescribe the circumstances on which the original validity of a contract shall be made to depend. If the legislative will be that certain agreements shall be in writing, that they shall be sealed, that they shall be attested by a certain number of witnesses, that they shall be recorded, or that they shall assume any prescribed form, before they become obligatory, all these are regulations which society may rightfully make, and which do not come within the restrictions of the Constitution, because they do not *impair* the obligation of the contract. The obligation must exist before it can be impaired; and a prohibition to impair it when made does not imply an inability to prescribe those circumstances which shall create its obligation. The Statutes of Frauds, therefore,

Subject of contracts
under control of soci-
ety.

which have been enacted in the several States, and which are acknowledged to flow from the proper exercise of State sovereignty, prescribe regulations which must precede the obligation of the contract, and, consequently, cannot impair that obligation. Acts of this description, therefore, are most clearly not within the prohibition of the Constitution.

The acts against usury are of the same character. They declare the contract to be void in the beginning. They deny that the instrument ever became a contract. They deny it all original obligation; and cannot impair that which never came into existence.

Acts against usury.

Acts of limitations approach more nearly to the subject of consideration, but are not identified with it. They defeat a contract once obligatory, and may, therefore, be supposed to partake of the character of laws which impair its obligation. But a practical view of the subject will show us that the two laws stand upon distinct principles.

In the case of *Sturges v. Crowninshield* it was observed by the court that these statutes relate only to the remedies which are furnished in the courts, and their language is generally confined to the remedy. They do not purport to dispense with the performance of a contract, but proceed on the presumption that a certain length of time, unexplained by circumstances, is reasonable evidence of a performance. It is on this idea alone that it is possible to sustain the decision, that a bare acknowledgment of the debt, unaccompanied with any new promise, shall remove the bar created by the act. It would be a mischief not to be tolerated if contracts might be set up at

In Sturges v. Crowninshield the distinction is shown between statutes of limitation and statutes impairing the obligation of contracts, the former being essentially a remedial statute.

any distance of time, when the evidence of payment might be lost, and the estates of the dead, or even of the living, be subjected to these stale obligations. The principle is, without the aid of a statute, adopted by the courts as a rule of justice. The Legislature has enacted no statute of limitations as a bar to suits on sealed instruments. Yet twenty years of unexplained silence on the part of the creditor is evidence of payment. On parol contracts, or on written contracts not under seal, which are considered in a less solemn point of view than sealed instruments, the Legislature has supposed that a shorter time might amount to evidence of performance, and has so enacted. All have acquiesced in these enact-

These enactments do not impair the obligation of contracts.

ments, but have never considered them as being of that class of laws which impair the obligation of contracts. In prescribing the evidence which shall be received in its courts, and the effect of that evidence, the State is exercising its acknowledged powers. It is likewise in the exercise of its legitimate powers when it is regulating the remedy and mode of proceeding in its courts.

The counsel for the plaintiff in error insist that the right to regulate the remedy and to modify the obligation of the contract are the same; that obligation and remedy are identical, that they are synonymous,—two words conveying the same idea.

The claim made by counsel for plaintiff that the words "obligation" and "remedy" are identical is clearly erroneous.

The answer given to this proposition by the defendant's counsel seems to be conclusive. They originate at different times. The obligation to perform is coeval with the undertaking to perform; it originates with the contract itself, and operates anterior to the time of perform-

Why above argument is fallacious here shown.

ance. The remedy acts upon a broken contract, and enforces a pre-existing obligation.

If there be anything in the observations made in a preceding part of this opinion respecting the source from which contracts derive their obligation, the proposition we are now considering cannot be true. It was shown, we think, satisfactorily, that the right to contract is the attribute of a free agent, and that he may rightfully coerce performance from another free agent who violates his faith. Contracts have, consequently, an intrinsic obligation. When men come into society they can no longer exercise this original and natural right of coercion. It would be incompatible with general peace, and is, therefore, surrendered. Society prohibits the use of private, individual coercion, and gives in its place a more safe and more certain remedy. But the right to contract is not surrendered with the right to coerce performance. It is still incident to that degree of free agency which the laws leave to every individual, and the obligation of the contract is a necessary consequence of the right to make it. Laws regulate this right, but where not regulated it is retained in its original extent. Obligation and remedy, then, are not identical; they originate at different times, and are derived Idem. from different sources.

But, although the identity of obligation and remedy be disproved, it may be, and has been, urged that they are precisely commensurate with each other, and are such sympathetic essences, if the expression may be allowed, that the action of law upon the remedy is immediately felt by the obligation; that they live, languish and die together. The use made of this argument is to show the absurdity and self-contradiction of the construc-

tion which maintains the inviolability of obligation, while it leaves the remedy to the State governments.

We do not perceive this absurdity or self-contradiction.

Our country exhibits the extraordinary spectacle of distinct and, in many respects, independent governments over the same territory and the same people. The local governments are restrained from impairing the obligation of contracts, but they furnish the remedy to enforce them, and administer that remedy in tribunals consti-

tuted by themselves. It has been shown that the obligation is distinct from the remedy; and it would seem

"Obligation" and
"remedy" discussed.

to follow that law might act on the remedy without acting on the obligation. To afford a remedy is certainly the high duty of those who govern to those who are governed. A failure in the performance of this duty subjects the government to the just reproach of the world. But the Constitution has not undertaken to enforce its performance. That instrument treats the States with the respect which is due to intelligent beings, understanding their duties and willing to perform them; not as insane beings, who must be compelled to act for self-preservation. Its language is the language of restraint, not of coercion. It prohibits the States from passing any law impairing the obligation of contracts; it does not enjoin them to enforce contracts. Should a State be sufficiently insane to shut up or abolish its courts, and thereby withhold all remedy, would this annihilation of remedy annihilate the obligation also of contracts? We know it would not. If the debtor should come within the jurisdiction of any court of another State, the remedy would be immediately applied, and the inherent obligation of the contract enforced. This

cannot be ascribed to a renewal of the obligation; for passing the line of a State cannot recreate an obligation which was extinguished. It must be the original obligation derived from the agreement of the parties, and which exists unimpaired though the remedy was withdrawn.

But we are told that the power of the State over the remedy may be used to the destruction of all beneficial results from the right; and hence it is inferred that the construction which maintains the inviolability of the obligation must be extended to the power of regulating the remedy.

The difficulty which this view of the subject presents does not proceed from the identity or connection of right and remedy, but from the existence of distinct governments acting on kindred subjects. The ^{Idem.} Constitution contemplates restraint as to the obligation of contracts, not as to the application of remedy. If this restraint affects a power which the Constitution did not mean to touch, it can only be when that power is used as an instrument of hostility to invade the inviolability of contract, which is placed beyond its reach. A State may use many of its acknowledged powers in such manner as to come in conflict with the provisions of the Constitution. Thus, the power over its domestic police, the power to regulate commerce purely internal, may be so exercised as to interfere with regulations of commerce with foreign nations or between the States. In such cases, the power which is supreme must control that which is not supreme, when they come in conflict. But this principle does not involve any self-contradiction, or deny the existence of the several powers in the respective governments. So, if a State shall not merely modify or

withhold a particular remedy, but shall apply it in such manner as to extinguish the obligation without performance, it would be an abuse of power which could scarcely be misunderstood, but which would not prove that remedy could not be regulated without regulating obligation.

The counsel for the plaintiff in error put a case of more difficulty, and urge it as a conclusive argument against the existence of a distinct line dividing obligation from remedy. It is this.

"Obligation" and
"remedy" further
examined.

The law affords remedy by giving execution against the person or the property, or both. The same power which can withdraw the remedy against the person can withdraw that against the property, or that against both, and thus effectually defeat the obligation. The Constitution, we are told, deals not with form, but with substance; and cannot be presumed, if it designed to protect the obligation of contracts from State legislation, to have left it thus obviously exposed to destruction.

The answer is that, if the law goes farther, and annuls the obligation without affording the remedy which satisfies it, if its action on the remedy be such as palpably to impair the obligation of the contract, the very case arises which we suppose to be within the Constitution. If it leaves the obligation untouched, but withholds the remedy, or affords one which is merely nominal, it is like all other cases of misgovernment, and leaves the debtor still liable to his creditor, should he be found, or should his property be found, where the laws afford a remedy. If that high sense of duty, which men selected for the government of their fellow-citizens must be supposed to feel, furnishes no security against a course of legislation which must end in self-destruction; if the solemn oath taken by

every member, to support the Constitution of the United States, furnishes no security against intentional attempts to violate its spirit while evading its letter, the question, how far the Constitution interposes a shield for the protection of an injured individual who demands from a court of justice that remedy which every government ought to afford, will depend on the law itself which shall be brought under consideration. The anticipation of such a case would be unnecessarily disrespectful, and an opinion on it would be, at least, premature. But, however the question might be decided, should it be even determined that such a law would be a successful evasion of the Constitution, it does not follow that an act, which operates directly on the contract after it is made, is not within the restriction imposed on the States by that instrument. The validity of a law acting directly on the obligation is not proved by showing that the Constitution has provided no means for compelling the States to enforce it.

We perceive, then, no reason for the opinion that the prohibition "to pass any law impair-
ing the obligation of contracts" is Rights and remedies distinguished. incompatible with the fair exercise of that discretion, which the State Legislatures possess, in common with all governments, to regulate the remedies afforded by their own courts. We think that obligation and remedy are distinguishable from each other. That the first is created by the act of the parties, the last is afforded by government. The words of the restriction we have been considering countenance, we think, this idea. No State shall "pass any law impairing the obligation of contracts." These words seem to us to import that the obligation is intrinsic, that it is created by the contract

itself, not that it is dependent on the laws made to enforce it. When we advert to the course of reading generally pursued by American statesmen in early life, we must suppose that the framers of our Constitution were intimately acquainted with the writings of those wise and learned men whose treatises on the laws of nature and nations have guided public opinion on the subjects of obligation and contract. If we turn to those treatises, we find them to concur in the declaration that contracts possess an original, intrinsic obligation, derived from the acts of free agents, and not given by government. We must suppose that the framers of our Constitution took the same view of the subject, and the language they have used confirms this opinion.

The propositions we have endeavored to maintain, of the truth of which we are ourselves convinced, are these:

Propositions which
this opinion maintains.

That the words of the clause in the Constitution which we are considering, taken in their natural obvious sense, admit of a prospective, as well as of a retrospective, operation;

That an act of the Legislature does not enter into the contract, and become one of the conditions stipulated by the parties; nor does it act externally on the agreement, unless it have the full force of law;

That contracts derive their obligation from the act of the parties, not from the grant of government; and that the right of government to regulate the manner in which they shall be formed, or to prohibit such as may be against the policy of the State, is entirely consistent with their inviolability after they have been formed;

That the obligation of a contract is not identified with

the means which government may furnish to enforce it; and that a prohibition to pass any law impairing it does not imply a prohibition to vary the remedy; nor does a power to vary the remedy imply a power to impair the obligation derived from the act of the parties.

We cannot look back to the history of the times when the august spectacle was exhibited of the assemblage of a whole people by their representatives in convention, in order to unite thirteen independent sovereignties under one

*Constitutional sanctity
of contracts—Origin
and purpose.*

government, so far as might be necessary for the purposes of union, without being sensible of the great importance which was at that time attached to the tenth section of the first article. The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the State Legislatures as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. The mischief had become so great, so alarming, as not only to impair commercial intercourse, and threaten the existence of credit, but to sap the morals of the people, and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.

To impose restraints on State legislation, as respected this delicate and interesting subject, was thought necessary by all those patriots who could take an enlightened

and comprehensive view of our situation; and the principle obtained an early admission into the various schemes of government which were submitted to the convention. In framing an instrument which was intended to be perpetual, the presumption is strong that every important principle introduced into it is intended to be perpetual also; that a principle expressed in terms to operate in all future time is intended so to operate. But, if the construction for which the plaintiff's counsel contend be the true one, the Constitution will have imposed a restriction, in language indicating perpetuity, which every State in the Union may elude at pleasure. The obligation of contracts in force, at any given time, is but of short duration; and, if the inhibition be of retrospective laws only, a very short lapse of time will remove every subject on which the act is forbidden to operate, and make this provision of the Constitution so far useless. Instead of introducing a great principle, prohibiting all laws of this obnoxious character, the Constitution will only suspend their operation for a moment, or except from it pre-existing cases. The object would scarcely seem to be of sufficient importance to have found a place in that instrument.

This construction would change the character of the provision, and convert an inhibition to pass laws impairing the obligation of contracts into an inhibition to pass

retrospective laws. Had this been the intention of
Idem.

the convention, is it not reasonable to believe that it would have been so expressed? Had the intention been to confine the restriction to laws which were retrospective in their operation, language could have been found, and would have been used, to convey this idea. The very word would have occurred to the framers of

the instrument, and we should have, probably, found it in the clause. Instead of the general prohibition to pass any "law impairing the obligation of contracts," the prohibition would have been to the passage of any retrospective law. Or, if the intention had been not to embrace all retrospective laws, but those only which related to contracts, still the word would have been introduced, and the State Legislatures would have been forbidden "to pass any *retrospective* law impairing the obligation of contracts," or "to pass any law impairing the obligation of any contracts previously made." Words which directly and plainly express the cardinal intent always present themselves to those who are preparing an important instrument, and will always be used by them. Undoubtedly, there is an imperfection in human language, which often exposes the same sentence to different constructions. But it is rare, indeed, for a person of clear and distinct perceptions, intending to convey one principal idea, so to express himself as to leave any doubt respecting that idea. It may be uncertain whether his words comprehend other things not immediately in his mind; but it can seldom be uncertain whether he intends the particular thing to which his mind is specially directed. If the mind of the convention, in framing this prohibition, had been directed, not generally to the operation of laws upon the obligation of contracts, but particularly to their retrospective operation, it is scarcely conceivable that some word would not have been used indicating this idea. In instruments prepared on great consideration, general terms, comprehending a whole subject, are seldom employed to designate a particular, we might say a minute, portion of that subject. The general language of the clause is such as might be

Idem.

suggested by a general intent to prohibit State legislation on the subject to which that language is applied,— the obligation of contracts; not such as would be suggested by a particular intent to prohibit retrospective legislation.

It is also worthy of consideration that those laws which had effected all that mischief the Constitution intended to prevent were prospective, as well as retrospective, in their operation. They embraced future contracts as well as those previously formed. There is the less reason for imputing to the convention an intention, not manifested by their language, to confine a restriction, intended to guard against the recurrence of those mischiefs, to retrospective legislation. For these reasons, we are of opinion that, on this point, the District Court of Louisiana has decided rightly.

NOTE.

After the foregoing general question was determined, which was not decisive of the case, came another, namely, Does a State insolvent law, which applies to contracts made after its passage, between *a citizen of the State where the law is passed and the citizen of another State*, impair their obligation? All of the court concurred in the conclusion that a discharge under a State law could not affect a creditor outside of the jurisdiction who did not become a party to the proceeding. See case of *Sturges v. Crowninshield*, *ante*, pp. 226–251, and notes; Van Santvoord, *Lives of the Chief Justices*, 398–402. The cases in the Supreme Court down to and including *Ogden v. Saunders* are reviewed and the results stated by Story, *Constitution*, III, secs. 1097–1110, 1368–1384; by Tucker, *Constitution*, II, pp. 559–563; and by Cooley, *Const. Lim.* 293, 294. Subsequent cases in the Supreme Court follow the doctrines of *Sturges v. Crowninshield* and *Ogden v. Saunders* as explained in *Boyle v. Zacharie* (6 Peters, 348, 1832); *Cook v. Moffat*, 5 How. 295; *Baldwin v. Hale*, 1 Wall. 223; *Gilman v. Lockwood*, 4 Wall. 409; *Boese v. King*, 108 U. S. 379; *Brown v. Smart*, 145 U. S. 454; *Butler v. Goreley*, 146 U. S. 303.

REFERENCES TO OGDEN v. SAUNDERS, IN MARSHALL
MEMORIAL.

VOL. I.

Justice Horace Gray, pp. 64, 98; Prof. James Bradley Thayer, p. 234 (*ante*, p. 228); Judge Le Baron Colt, p. 803; Charles E. Perkins, p. 322; Justice James T. Mitchell, pp. 489, 490; "The best lawyers of to-day are far from sure that the opinion of the Chief Justice was not the wisest and most correct." *Id.*

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Judge James C. MacRae, p. 84; Hampton L. Carson, Esq., p. 261; Hon. John F. Follett, p. 278, approves the opinion of the Chief Justice; Hon. William Lindsay, p. 359; John N. Baldwin, Esq., p. 424; Frederick W. Lehmann, Esq., p. 480.

VOL. III.

Judge John H. Rogers, pp. 35, 39, 40; Julius C. Gunter, Esq., p. 118; Horace G. Platt, Esq., p. 229; Hon. E. J. Phelps, p. 388; *ante*, 227.

THE UNITED STATES HAS THE CONSTITUTIONAL POWER TO ACQUIRE TERRITORY BY CONQUEST OR TREATY, AND CONGRESS, SUBJECT TO THE CONSTITUTION, MAY PROVIDE FOR THE GOVERNMENT OF SUCH TERRITORY DURING THE TERRITORIAL CONDITION.

Throughout the history of the United States, the fundamental and, in manifold recurring phases, the controverted question has been, Whether the Constitution made us a Nation with all the powers of a national sovereignty, or only a League with the limitations and weaknesses of such a form of government. Marshall is the great champion of the principle of nationality. From first to last under all circumstances, with a courage that never faltered, he maintained and supported that principle in all his great judgments expounding the Constitution. The principle of nationality runs through them all like a majestic stream that to the end "keeps due on in its compulsive course."¹

The next case — *The American Insurance Company v. Canter* — like his other constitutional decisions, illustrates the truth of the foregoing observations.

The Constitution is utterly silent as to the power of the United States to acquire territory. Strict constructionists, therefore, denied the power. Jefferson thought the government had no such power, and he drew up

¹ Marshall Memorial, I, Introduction, xii-xiv.

the draft of an amendment of the Constitution to sanction the Louisiana purchase, the greatest act of his administration, and one of the most beneficent in the history of the country.¹

This question gave Marshall no difficulty. He solved it in one single sentence in the following opinion: "The Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, *either by conquest or treaty*." In one form this question came up in *Loughborough v. Blake*.² It reappeared in the *American Insurance Company v. Canter*. The power to acquire necessarily includes the power to govern, and that power belongs to the Nation and to Congress so long as the territory acquired remains in a territorial condition. In the following case it was contended that upon the acquisition of Florida it became an integral part of the United States over which the Constitution *ex proprio vigore* extended, and consequently the admiralty and maritime jurisdiction could, under the Constitution, be exercised only by the admiralty courts of the United States. But this last position was denied, the Chief Justice saying: "Although admiralty jurisdiction can be exercised in the States in admiralty courts only which are established in pursuance of the third article of the Constitution, *the same limitation does not extend to the Territories*. In legislating for them Congress exercises the combined powers of the General and of a State government."

¹ Henry Adams, *Hist. of the U. S.*, II, ch. IV, 86, 87, where text of draft is given.

² *Ante*, p. 339 and notes.

It is settled by our national usage and by the decisions of the Supreme Court that the Nation has the power to acquire territory by conquest or treaty; the only questions still debated are: Whether or how far certain express or specific provisions of the Constitution apply of their own intrinsic force to such territory, so as to be beyond the power of Congress; or in the phrase of the day, whether, to what extent, and in what sense, does "the Constitution follow the flag." These deeply interesting and momentous questions underwent thorough discussion at the bar and examination by the court in what are known as the Insular Cases.¹

Inasmuch as the decisions in the Insular Cases were rendered by five justices to four, and as only four of the five placed their judgments upon the same ground, it is difficult to state precisely what principles of constitutional law those cases determined. It may perhaps be fairly gathered from them and preceding decisions that the Constitution is operative in acquired territory so far as its provisions are applicable to a territory in that condition; that such provisions are applicable of their own intrinsic force to the great guaranties of life, liberty, property and equal protection of the law, but not necessarily applicable to questions arising out of the revenue and commerce clauses of the Constitution; that as to such questions Congress has plenary power, and absolute uni-

¹See *Loughborough v. Blake*, *ante*, and notes. "The Insular Cases," comprising Records, Briefs, etc., published by Congress, compiled by Albert H. Howe, pp. 1061, Washington, 1901. *Canter's Case* is cited by counsel on pp. 43, 59, 65, 66, 76, 144, 164, 189, 246, 290, 323, 404, 633, 691, 703, 897, 946.

The decisions of the Supreme Court in the Insular Cases are reported in 182 U. S. 1-397.

formity or unity throughout the whole of the United States in respect of imposts, duties and commercial regulations, is not absolutely enjoined by the Constitution so long as the Territorial condition remains. A distinction is therefore recognized to some extent between the power of Congress as respects States and Territories, and this distinction has, by analogy at least, support in the following opinion of Chief Justice Marshall in the Florida case:¹

American Insurance Company and Others v. Canter.

January Term, 1828.

[1 Peters' Reports, 511-546.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

¹ The decisions of the Supreme Court in the Insular Cases were the subject of an address in 1901 before the American Bar Association by Hon. Charles E. Littlefield, who seemed to consider that these cases overruled the decision of Chief Justice Marshall made eighty years before. (Reports Am. Bar Ass'n, vol. xxiv, 241, 1901.) The Insular decisions were also the subject of a like address in 1902, by the Hon. John G. Carlisle (Id., vol. xxv, p. 250, 1902), who, if the judgments of the Supreme Court therein are accepted as final, considers them to involve "the destruction of the revenue and commercial unity of the Republic, and to leave Congress free to impose unequal burdens and restrictions upon the people in different parts of the country," but only, we suppose, during the existence of the Territorial condition. These able addresses will well repay careful perusal, as also the elaborate paper of Charles A. Gardiner, LL. D., before the New York State Bar Association, on "The Constitution and our New Possessions; an Answer to Ex-President Harrison's Ann Arbor Address." Report, New York State Bar Association, 1901, vol. xxiv, 187.

A Territorial court held by judges whose appointments are for four years cannot be the depository of any part of the judicial power conferred by the Constitution on the General Government.

A court erected by the Territorial Legislature of Florida to try and determine cases of salvage is in conformity with the Constitution and laws of the United States.

A case in admiralty is not "a case arising under the Constitution and laws of the United States" within the meaning of the eighth section of the act of March 3, 1823, to amend the act organizing the Territory of Florida.

Whether the power of Congress to govern the Territories is derived from the right of the United States to acquire territory, or from that clause in the Constitution which empowers Congress "to make all needful rules and regulations concerning the territory and other property of the United States," the possession of the power is unquestioned.

The American Insurance Company insured certain bales of cotton from New Orleans to France. The vessel in which it was shipped was wrecked on the coast of Florida, but the cotton was saved, and sold in order to pay the claim of those who saved it. This sale was made under the order of a Territorial court of Florida. The owners having abandoned to the insurance company, the company claimed part of the cotton which went to Charleston, and commenced suit for it in the United States District Court and obtained a judgment in their favor. Canter, who had bought at the sale in Florida, appealed to the Circuit

Statement of facts.

Court, which reversed the decree of the District Court; whereupon the insurance company appealed to the Supreme Court,¹ the opinion of which was as follows:

MARSHALL, Chief Justice. The plaintiffs filed their libel in this cause in the District Court of South Carolina, to obtain restitution of three hundred and fifty-six bales of cotton, part of the cargo of the ship Point à Petre, which had been insured by them on a voyage from New Orleans to Havre de Grâce in France. The Point à Petre was wrecked on the coast of Florida, the cargo saved by the inhabitants and carried into Key West, where it was sold for the purpose of satisfying the salvors, by virtue of a decree of a court, consisting of a notary and five jurors, which was erected by an act of the Territorial Legislature of Florida. The owners abandoned to the underwriters, who, having accepted the same, proceeded against the property, alleging that the sale was not made by order of a court competent to change the property.

Opinion.

How the case arose.

David Canter claimed the cotton as a *bona fide* purchaser, under the decree of a competent court, which awarded seventy-six per cent. to the salvors on the value of the property saved.

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

GABRIEL DUVAL,

JOSEPH STORY,

SMITH THOMPSON,

ROBERT TRIMBLE,

} *Associate Justices.*

Mr. D. B. Ogden appeared for the appellants.

Mr. Daniel Webster and Mr. Whipple appeared for the claimants.

The district judge pronounced the decree of the Territorial court a nullity, and awarded restitution to the libelants of such part of the cargo as he supposed to be identified by the evidence; deducting therefrom a salvage of fifty per cent.

District judge pronounced the decree of Territorial court a nullity.

The libelants and claimant both appealed. The Circuit Court reversed the decree of the District Court, and decreed the whole cotton to the claimant, with costs, on the ground that the proceedings of the court at Key West were legal, and transferred the property to the purchaser.

Circuit Court reversed the decree of the District Court.

From this decree the libelants have appealed to this court.

The cause depends mainly on the question whether the property in the cargo saved was changed by the sale at Key West. The conformity of that sale to the order under which it was made has not been controverted. Its validity has been denied on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an act of the Territorial Legislature of Florida, passed on the 4th July, 1823, which is inserted in the record. That act purports to give the power which has been exercised; consequently, the sale is valid, if the Territorial Legislature was competent to enact the law.

How Territorial Court was constituted.

The course which the argument has taken will require that, in deciding this question, the court should take into view the relation in which Florida stands to the United States.

Relation of Florida to the United States.

The Constitution confers absolutely on the Govern-

ment of the Union the powers of making war and of making treaties; consequently that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed, either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country transfers the allegiance of those who remain in it; and the law which may be denominated political is necessarily changed, although that which regulates the intercourse and general conduct of individuals remains in force until altered by the newly created power of the State.

On the 2d of February, 1819, Spain ceded Florida to the United States. The sixth article of the treaty of cession contains the following provision: "The inhabitants of the Territories which his Catholic majesty cedes to the United States by this treaty shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of the privileges, rights and immunities of the citizens of the United States." Idem.

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights and immunities of the citizens of the United States. It is unnecessary to inquire whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government till Florida shall become a State. In the meantime Florida continues to be a Territory of the United States, governed by virtue of that clause in the Constitution which empowers Congress "to make all needful rules and regulations respecting the territory or other property belonging to the United States."

Perhaps the power of governing a Territory belonging to the United States which has not by becoming a State acquired the means of self-government may result necessarily from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Whichever may be the source whence the power is derived, the possession of it is unquestioned. In execution of it Congress, in 1822, passed "An Act for the

Act of Congress of 1822 and act of 3d of March, 1823, amendatory thereof.

Establishment of a Territorial Government in Florida;" and on the 3d of March, 1823, passed another act to amend the act of 1822. Under this act the Territorial Legislature enacted the law now under consideration.

The fifth section of the act of 1823 creates a Territorial Legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid which is

Fifth section of act of 1823.

inconsistent with the laws and Constitution of the United States.

The seventh section enacts: "That the judicial power shall be vested in two superior courts, and in such inferior courts and justices of the peace as the legislative council of the Territory may from time to time establish." After prescribing the place of session and the jurisdictional limits of each court, the act proceeds to say: "Within its limits, herein described, each court shall have jurisdiction in all criminal cases, and exclusive jurisdiction in all capital offenses, and original jurisdiction in all civil cases of the value of one hundred dollars, arising under, and cognizable by, the laws of the Territory now in force therein, or which may at any time be enacted by the legislative council thereof."

Seventh section of said act of 1823.

The eighth section enacts: "That each of the said superior courts shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States, which, by an act to establish the judicial courts of the United States, approved the 24th of September, 1789, and an act in addition to the act entitled an act to establish the judicial courts of the United States, approved the 2d of March, 1793, was vested in the court of the Kentucky district."

Eighth section of said act.

The powers of the Territorial Legislature extend to all rightful objects of legislation, subject to the restriction that their laws shall not be "inconsistent with the laws and Constitution of the United States." As salvage is admitted to come within this description, the act is valid, unless it can be brought within the restriction.

The counsel for the libelants contend that it is incon-

sistent with both the law and the Constitution; that it is inconsistent with the provisions of the law by which the Territorial government was created, and with the amendatory act of March, 1823. It vests, they say, in an inferior tribunal a jurisdiction which is by those acts vested exclusively in the superior courts of the Territory.

This argument requires an attentive consideration of the sections which define the jurisdiction of the superior courts.

The seventh section of the act of 1823 vests the whole judicial power of the Territory "in two superior courts, and in such inferior courts, and justices of the peace, as the legislative council of the Territory may from time to time establish." This general grant is common to the superior and inferior courts, and their jurisdiction is concurrent, except so far as it may be made exclusive, in either, by other provisions of the statute. The jurisdiction of the superior courts is declared to be exclusive over capital offenses; on every other question over which those courts may take cognizance by virtue of this section, concurrent jurisdiction may be given to the inferior courts. Among these subjects are "all civil cases arising under and cognizable by the laws of the Territory, now in force therein, or which may at any time be enacted by the legislative council thereof."

It has been already stated that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recongizes this principle

Seventh section of act of 1823 vests judicial power in two superior courts.

by using the words "laws of the Territory now in force therein." No laws could then have been in force but those enacted by the Spanish government. If among these a law existed on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over cases arising under it was conferred on the superior courts, but that jurisdiction was not exclusive. A Territorial act, conferring jurisdiction over the same cases on an inferior court, would not have been inconsistent with this section.

The eighth section extends the jurisdiction of the superior courts, in terms which admit of more doubt. The words are, "That each of the said superior courts shall, moreover, have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States, which, by an act to establish the judicial courts of the United States, was vested in the court of the Kentucky district."

Words of the eighth section extending the jurisdiction of the superior courts.

The eleventh section of the act declares, "That the laws of the United States relating to the revenue and its collection, and all other public acts of the United States not inconsistent or repugnant to this act, shall extend to, and have full force and effect in, the Territory aforesaid."

The laws which are extended to the Territory, by this section, were either for the punishment of crime or for civil purposes. Jurisdiction is given in all criminal cases by the seventh section; but in civil cases, that section gives jurisdiction only in those which arise under and are cognizable by the laws of the Territory; consequently, all civil cases, arising under the laws which are extended to the Territory by the eleventh section, are cognizable

in the Territorial courts by virtue of the eighth section; and in those cases the superior courts may exercise the same jurisdiction as is exercised by the court for the Kentucky district.

The question suggested by this view of the subject, on which the case under consideration must depend, is this:

Is the admiralty jurisdiction of the District Courts of the United States vested in the superior courts of Florida under the words of the eighth section declaring that each of the said courts "shall, moreover, have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States," which was vested in the court of the Kentucky district?

Is admiralty jurisdiction of the District Courts of United States vested in the superior courts of Florida under eighth section?

It is observable that this clause does not confer on the Territorial courts all the jurisdiction which is vested in the court of the Kentucky district, but that part of it only which applies to "cases arising under the laws and Constitution of the United States." Is a case of admiralty of this description?

The Constitution and laws of the United States give jurisdiction to the District Courts over all cases in admiralty; but jurisdiction over the case does not constitute the case itself. We are, therefore, to inquire whether cases in admiralty, and cases arising under the laws and Constitution of the United States, are identical.

Are cases in admiralty and cases arising under laws and Constitution of United States identical?

If we have recourse to that pure fountain from which all the jurisdiction of the Federal courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares that "the judicial

power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction."

The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise. It is not, then, to the eighth section of the Territorial law that we are to look for the grant of admiralty and maritime jurisdiction to the Territorial courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the District Court of Kentucky.

Constitution contemplates three distinct classes of cases.

It has been contended that, by the Constitution, the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one supreme court, and in such inferior courts as Congress shall from time to time ordain and establish." Hence it has been argued that Congress cannot vest admiralty jurisdiction in courts created by the Territorial Legislature.

We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares that "the judges both of the supreme and inferior courts shall hold their offices during good behavior."¹ The judges of the superior courts of Florida hold their offices for four years. These courts, then, are not constitutional courts, in which the judicial power conferred by the Constitu-

Territorial courts cannot be the depository of any part of the judicial power conferred on the General Government by the Constitution.

tion on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is defined in the third article of the Constitution; but is conferred by Congress in the execution of those general powers which that body possesses over the Territories of the United States. Although admiralty jurisdiction can be exercised, in the States, in those courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the Territories. In legislating for them, Congress exercises the combined powers of the General and of a State government.

We think, then, that the act of the Territorial Legislature, erecting the court by whose decree the cargo of the *Point à Petre* was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently,

Decree of Circuit Court affirmed.

¹ Tucker, *Const. of U. S.*, II, 756, 820; Cooley on *Const. Law*, 52, 53.

the sale made in pursuance of it changed the property, and the decree of the Circuit Court, awarding restitution of the property to the claimant, ought to be affirmed with costs.

NOTE

Chancellor Kent says: "The constitutionality of the acquisition of foreign territory is vindicated, established and settled by the Supreme Court as one necessarily flowing from the power of the Union to make treaties," citing *American Ins. Co. v. Canter*, 1 Pet. 511. "It belongs, therefore, upon that principle, exclusively to the President, with the advice and consent of two-thirds of the members of the Senate present, to make the acquisition. But in 1845 Congress, by joint resolution, under the power of the Constitution (art. 4, sec. 3), that 'new States may be admitted by the Congress into this Union,' admitted the foreign and independent State of Texas into the Union as a separate State, upon terms to which Texas afterwards acceded." Kent, Com. (12th Ed.), I, 259, note.

"The government of the United States which can lawfully acquire territory by conquest or treaty must, as an inevitable consequence, possess the power to govern it. The Territories must be under the dominion and jurisdiction of the Union, or be without any government; for the Territories do not, when acquired, become entitled to self-government, and they are not subject to the jurisdiction of any State. They fall under the power given to Congress by the Constitution. This was the doctrine and decision of the Supreme Court in the case of *The American Ins. Co. v. Canter*." Kent, Com. (12th Ed.), I, 384, note.

"The acquisition of the foreign territories of Louisiana and Florida by the United States, by purchase, was to be supported only by a very liberal and latitudinarian construction of the incidental powers of the government under the Constitution." Kent, Com. (12th Ed.) I, 259, note. Story, Com. on the Const., III, ch. xxvii, §§ 1278-1283, also §§ 1318-1321; Von Holst, Const. Law, 98 and note 1, 213.

Discussion of the acquisition of Louisiana, see Miller on Const. of the U. S. 128-131 (note by J. C. Bancroft Davis); Thorpe, Const. Hist. of U. S., II, 348 *et seq.*; Marshall Memorial, II, 477, 478.

"As long ago as 1828 it was held in an opinion delivered by Chief Justice Marshall, that a Territorial court was not a 'constitutional court, in which the judicial power conferred by the Constitution on the General Government can be deposited,' but a legislative court, 'created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States.' The District Court of Alaska has just been held to be a court of this stamp,¹ Justices Field, Gray and Brown dissenting, but not on this point." Miller, Const. of U. S. 369, 370. (Note by J. C. Bancroft Davis.)

REFERENCES TO AMERICAN INS. CO. v. CANTER, IN
MARSHALL MEMORIAL.

In *The American Insurance Company v. Canter*, where the validity and effect of the treaty of 1819, by which Spain ceded Florida to the United States, was before the court, the Chief Justice said: "The Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty." *Judge Le Baron Colt*, I, 801; *Hon. Francis M. Finch*, I, 408.

Marshall also asserted the right of the government to enlarge the national domain, saying: "The Constitution confers absolutely on the Government of the Union the power of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty." *Hon. John Bassett Moore*, I, 523, 528.

In *American Insurance Co. v. Canter* the court passed upon the power of Congress to legislate in the Territory of Florida, a matter of great interest at the present moment in these days of enlarged boundaries, enlarged responsibilities and embarrassing complications. *Hon. William A. Ketcham*, II, 295.

No question with respect to the acquisition of Louisiana ever came before the Supreme Court, but, many years after, the validity and effect of the treaty by which Florida was acquired were con-

¹ *McAllister v. United States*, 141 U. S. 174-188.

sidered in *Insurance Company v. Canter*, and Marshall held that "the Constitution confers absolutely on the Government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty." But while the acts of the government were thus in conflict with the theories of those who administered it, the theories were not abandoned altogether, and the conflict continued. *Frederick W. Lehmann*, II, 478, 479.

In the case of *The American Insurance Co. v. Canter*, in 1828, in one terse sentence Marshall made clear, beyond question, the constitutional power of the government to acquire territory either by conquest or by treaty — a power which Jefferson himself doubted even when he made the Louisiana purchase. *Hon. Henry Hitchcock*, II, 515, 516; *Judge Cornelius H. Hanford*, III, 251.

**THE STATES HAVE NO POWER TO TAX UNITED
STATES BONDS OR STOCKS.**

The next case — *Weston v. City of Charleston* — is an application of the principle decided in the previous cases of *M'Culloch v. Maryland* and *Osborn v. Bank of the United States*, that "the States have no power by *taxation* or otherwise to retard, impede, burden, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

The case of *Weston v. Charleston* is important because it is the first declaration by the Supreme Court of the doctrine now universally acknowledged and understood, that neither the States nor their municipalities can tax United States bonds, stocks or securities issued by the General Government to borrow money or otherwise conduct its constitutional operations.

The case should be read in connection with *M'Culloch v. Maryland*¹ and *Osborn v. Bank of the United States*,² on the one hand, and with *Providence Bank v. Billings*,³ on the other.

To lawyers the case is also important because of its definition (ever since accepted) of what constitutes a "suit," and what constitutes a "final" judgment of the

¹ *Ante*, pp. 252-298, and notes.

² *Ante*, pp. 468-511, and notes.

³ *Post*, pp. 645-654, and notes.

highest court of a State, which may be reviewed by the Supreme Court under the twenty-fifth section of the Judiciary Act.¹

Weston and Others v. City of Charleston.

January Term, 1839.

[2 Peters' Reports, 449-480.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

A tax on stock of the United States, held by an individual citizen of a State, is a tax on the power to borrow money on the credit of the United States, and cannot be levied by or under the authority of a State consistently with the Constitution.

A judgment of the highest court of a State, in a proceeding for a prohibition, is a "final" judgment in a "suit" under section 25 of the Judiciary Act.

The city council of Charleston, under State laws, having taxed certain interest-paying stocks, including some stocks issued by the United States for the national debt, Weston, as a holder of such United States stock, filed a suggestion in the court of common pleas to prohibit the collection of this tax as being unconstitutional. The prohibition being granted, the city council appealed to the Constitutional Court, the highest in the State, and that court having decided the ordinance laying the tax to be constitutional,

Statement of facts.

¹ As to this section of the Judiciary Act, see *ante*, p. 359.

Weston sued out his writ of error, under section 25 of the Judiciary Act, to the Supreme Court¹ of the United States, the opinion of which was as follows:

MARSHALL, Chief Justice. This case was argued on its merits at a preceding term; but a doubt having arisen with the court respecting its jurisdiction in cases of prohibition, that doubt was suggested to the bar, and a reargument was requested. It has been reargued at this term.

The power of this court to revise the judgments of a State tribunal depends on the twenty-fifth section of the Judicial Act. That section enacts "that a final judgment or decree in any suit in the highest court of law or equity of a State in which a decision in the suit could be had," "where is drawn in question the validity of a statute, or of an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of such their validity," "may be re-examined and reversed or affirmed in the Supreme Court of the United States."

In this case the city ordinance of Charleston is the ex-

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

WILLIAM JOHNSON,

GABRIEL DUVAL,

JOSEPH STORY,

SMITH THOMPSON,

} *Associate Justices.*

Justice Johnson and Justice Thompson dissenting.

Mr. Robert Y. Hayne appeared for plaintiffs in error.

Mr. Henry N. Cruger and Mr. Hugh S. Legare appeared for defendants in error.

ercise of an "authority under the State of South Carolina," "the validity of which has been drawn in question on the ground of its being repugnant to the Constitution," and "the decision is in favor of its validity." The question, therefore, which was decided by the Constitutional Court is the very question on which the revising power of this tribunal is to be exercised, and the only inquiry is, whether it has been decided in a case described in the section which authorizes the writ of error that has been awarded. Is a writ of prohibition a suit?

A writ of prohibition is a suit — Suit defined.

The term is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. The question between the parties is precisely the same as it would have been in a writ of replevin, or in an action of trespass. The constitutionality of the ordinance is contested; the party aggrieved by it applies to a court; and at his suggestion a writ of prohibition, the appropriate remedy, is issued. The opposite party appeals; and, in the highest court, the judgment is reversed and judgment given for the defendant. This judgment was, we think, rendered in a suit.

We think also that it was a final judgment, in the sense in which that term is used in the twenty-fifth section of the Judicial Act. If it were applicable to those judgments and decrees only in which the right was finally decided, and could never

Final judgment defined.

again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than Congress could have intended. Judgments in actions of ejectment, and decrees in chancery dismissing a bill without prejudice, however deeply they might affect rights protected by the Constitution, laws, or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties, and this court would not revise and correct the judgment. The word "final" must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause.

We think, then, that the writ of error has brought the cause proper before this court.

This brings us to the main question. Is the stock issued for loans made to the government of the United States liable to be taxed by States and corporations?

Congress has power "to borrow money on the credit of the United States." The stock it issues is the evidence of a debt created by the exercise of this power. The tax in question is a tax upon the contract subsisting between the government and the individual. It bears directly upon that contract, while subsisting and in full force. The power operates upon the contract the instant it is framed, and must imply a right to affect that contract.

If the States and corporations throughout the Union possess the power to tax a contract for the loan of money, what shall arrest this principle in its application to every other contract? What measure can government adopt which will not be exposed to its influence?

Main question: Is stock issued for loans to United States liable to be taxed by States?

But it is unnecessary to pursue this principle through its diversified application to all the contracts and to the various operations of government. No one can be selected which is of more vital interest to the community than this of borrowing money on the credit of the United

Borrowing money on credit of United States of vital interest.

States. No power has been conferred by the American people on their government, the free and unburdened exercise of which more deeply affects every member of our Republic. In war, when the honor, the safety, the independence of the Nation are to be defended, when all its resources are to be strained to the utmost, credit must be brought in aid of taxation, and the abundant revenue of peace and prosperity must be anticipated to supply the exigencies, the urgent demands of the moment. The people, for objects the most important which can occur in the progress of nations, have empowered their government to make these anticipations, "to borrow money on the credit of the United States."

Can anything be more dangerous, or more injurious, than the admission of a principle which authorizes every State and every corporation in the Union, which possesses the right of taxation, to burden the exercise of this power at their discretion?

To authorize every State and every corporation which possesses the right of taxation to burden the exercise of this power at their discretion would be very dangerous.

If the right to impose the tax exists, it is a right which in its nature acknowledges no limits. It may be carried to any extent, within the jurisdiction of the State or corporation which imposes it, which the will of each State and corporation may prescribe. A power which is given by the whole American people for their common good, which is to be exercised at the most critical periods for the most important purposes, on the free

exercise of which the interests certainly, perhaps the liberty, of the whole may depend, may be burdened, impeded, if not arrested, by any of the organized parts of the Confederacy.

In a society formed like ours with one supreme government for national purposes and numerous State governments for other purposes, in many respects independent and in the uncontrolled exercise of many important powers, occasional interferences ought not to surprise us. The power of taxation is one of the most essential to a

Attempt to limit power of taxation a delicate and difficult duty.

State and one of the most extensive in its operation. The attempt to maintain a rule which shall limit its exercise is, undoubtedly, among the most delicate and difficult duties which can devolve on those whose province it is to expound the supreme law of the land in its application to the cases of individuals. This duty has more than once devolved on this court. In the performance of it we have considered it as a necessary consequence from the supremacy of the government of the whole, that its action in the exercise of its legitimate powers should be free and unembarrassed by any conflicting powers in the possession of its parts; that the powers of a State cannot rightfully be so exercised as to impede and obstruct the free course of those measures which the government of the States united may rightfully adopt.

This subject was brought before the court in the case of *M'Culloch v. The State of Maryland* (4 Wheaton, 316), when it was thoroughly argued and deliberately considered. The question decided in that case bears a near resemblance to that which is involved in this. It was discussed at the bar in all its relations and examined by the court

M'Culloch v. Maryland re-affirmed.

with its utmost attention. We will not repeat the reasoning which conducted us to the conclusion thus formed; but that conclusion was that "all subjects over which the sovereign power of a State extends are objects of taxation; but those over which it does not extend are upon the soundest principles exempt from taxation." "The sovereignty of a State extends to everything which exists by its own authority, or is introduced by its permission;" but not "to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States." "The attempt to use" the power of taxation "on the means employed by the government of the Union, in pursuance of the Constitution, is itself an abuse because it is the usurpation of a power which the people of a single State cannot give."

The court said in that case that "the States have no power, by taxation or otherwise, to retard, impede, burden or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government."

We retain the opinions which were then expressed. A contract made by the government, in the exercise of its power, to borrow money on the credit of the United States, is, undoubtedly, independent of the will of any State in which the individual who lends may reside, and is, undoubtedly, an operation essential to the important objects for which the government was created. It ought, therefore, on the principles settled in the case of *M'Culloch v. State of Maryland*, to be exempt from State taxation, and, consequently, from being taxed by corporations deriving their power from States.

It is admitted that the power of the government to borrow money cannot be directly opposed, and that any law directly obstructing its operation would be void; but a distinction is taken between direct opposition and those measures which may consequentially affect it; that is, that a law prohibiting loans to the United States would be void, but a tax on them to any amount is allowable.

It is, we think, impossible not to perceive the intimate connection which exists between these two modes of acting on the subject.

It is not the want of original power in an independent sovereign State, to prohibit loans to a foreign government, which restrains the Legislature from direct opposition to those made by the United States. The restraint is imposed by our Constitution. The American people have conferred the power of borrowing money on their government, and, by making that government supreme, have shielded its action, in the exercise of this power, from the action of the local governments. The grant of the power is incompatible with a restraining or controlling power; and the declaration of supremacy is a declaration that no such restraining or controlling power shall be exercised.

The right to tax the contract to any extent, when made, must operate upon the power to borrow before it is exercised, and have a sensible influence on the contract. The extent of this influence depends on the will of a distinct government. To any extent, however inconsiderable, it is a burden on the operations of government. It may be carried to an extent which shall arrest them entirely.

Power to borrow money by the government cannot be directly or indirectly opposed.

Power to borrow money conferred by the people on their government.

It is admitted by the counsel for the defendants that the power to tax stock must affect the terms on which loans will be made; but this objection, it is said, has no more weight, when urged against the application of an acknowledged power to government stock, than if urged against its application to lands sold by the United States.

Point made by counsel
for defendants an-
swered.

The distinction is, we think, apparent. When lands are sold, no connection remains between the purchaser and the government. The lands purchased become a part of the mass of property in the country, with no implied exemption from common burdens. All lands are derived from the general or particular government, and all lands are subject to taxation. Lands sold are in the condition of money borrowed and repaid. Its liability to taxation, in any form it may then assume, is not questioned. The connection between the borrower and the lender is dissolved. It is no burden on loans, it is no impediment to the power of borrowing, that the money, when repaid, loses its exemption from taxation. But a tax upon debts due from the government stands, we think, on very different principles from a tax on lands which the government has sold.

Tax upon debts due
from the government
different from tax on
lands which govern-
ment has sold.

“The Federalist” has been quoted in the argument, and an eloquent and well merited eulogy has been bestowed on the great statesman who is supposed to be the author of the number from which the quotation was made. This high authority was also relied upon in the case of *M'Culloch v. The State of Maryland*, and was considered by the court. Without repeating what was then said, we refer to it as exhibiting our view of the

sentiments expressed on this subject by the authors of that work.

It has been supposed that a tax on stock comes within the exceptions stated in the case of *M'Culloch v. Maryland* a case in point. *M'Culloch v. The State of Maryland.*

We do not think so. The Bank of the United States is an instrument essential to the fiscal operations of the government, and the power which might be exercised to its destruction was denied. But property acquired by that corporation in a State was supposed to be placed in the same condition with property acquired by an individual.

The tax on government stock is thought by this court to be a tax on the contract, a tax on the power to borrow money on the credit of the United States, and, consequently, to be repugnant to the Constitution.¹

We are, therefore, of opinion that the judgment of the Constitutional Court of the State of South Carolina, reversing the order made by the Court of Common Pleas, awarding a prohibition to the city council of Charleston to restrain them from levying a tax imposed on six and seven per cent. stock of the United States, under an ordinance to raise supplies to the use of the city of Charleston for the year 1823, is erroneous in this: that the said Constitutional Court adjudged that the said ordinance was not repugnant to the Constitution of the United States; whereas, this court is of opinion that such repugnancy does exist. We are, therefore, of opinion that the said judgment ought to be reversed and annulled, and the cause remanded to the Constitutional Court for the State of South Carolina, that farther proceedings may be had therein according to law.

¹ Miller on Const. of U. S. 258.

NOTE.

Referring to the decision in this case, Cooley says: "This principle is unquestionably sound, but a great deal of difficulty has been experienced in consequence of it, under the law of Congress establishing the National Banking System, which undertakes to subject the National Banks to State taxation, but at the same time to guard those institutions against unjust discriminations, by providing that their shares shall only be taxed at the place where the bank is located, and in the same manner as shares in the State banks are taxed. The difficulty is in harmonizing the State and National laws on the subject." Const. Lim. 482, note 2. See *ante*, pp. 252, 253, 288, and notes as to State's power of taxation.

Several important cases have arisen under the present national currency and banking acts. In the first of these the New York Court of Appeals took a distinction between a tax on United States stock *eo nomine*, which was the case of *Weston v. Charleston*, and one on the actual value of the capital stock of a bank, part of whose property was in fact invested in United States stock, and held a tax of the latter description valid. This decision was reversed by the Supreme Court of the United States in *Bank of Commerce v. New York*, 2 Black, 620. A statute was then passed by the State Legislature taxing the banks "on a *valuation equal to* the amount of their capital stock paid in, or secured to be paid in, and their surplus earnings," etc. This also having been upheld by the courts of the State, was declared by the Supreme Court to be a tax on the property of the banks, and therefore, like the previous one, invalid, when that property consisted of United States stock. *Bank Tax Case*, 2 Wall. 200; Kent, Com. (12th Ed.), I, 429, note 1. On this point see also *The Banks v. The Mayor*, 7 Wall. 16; *Bank v. Supervisors*, 7 Wall. 26.

It is also decided that the income derived from United States bonds, certificates of stock and other securities of the government cannot be taxed, as such a tax would not be consistent with the constitutional power "to borrow money on the credit of the United States, inasmuch as if the States possessed such a power they could, practically, exclude such securities from their markets. *Bank of*

Commerce v. New York, 2 Black, 620; Bank Tax Case, 2 Wall. 200; The Banks v. The Mayor, 7 Wall. 16.

"A great many decisions have been made to settle this doctrine. The States have been fertile in constantly devising many means to tax banks, if possible, and the recent volumes of reports of the Supreme Court are full of cases having relation to such attempts, and the discussions which they have elicited. One case which may be referred to in this connection is that of *The People v. Weaver*, 100 U. S. 539." Miller on Const. of U. S. 259. See Story, Com. on Const., II, ch. XIV, § 1042 *et seq.*; Thorpe, Const. Hist. of U. S., II, 507, and note 3; Judson on Taxation, 6, 7, 8, 17. The taxing power of the States is elaborately considered and prior cases reviewed by Mr. Justice Gray in *Brocklin v. Tennessee*, 117 U. S. 151.

The following are leading cases relating to the power of taxation by Congress and limitations upon the power of the States: *State Tax on Foreign-Held Bonds*, 15 Wallace, 300 (1872). Taxation of property of interstate telegraph companies: *St. Louis v. Western Union Telegraph Company*, 148 U. S. 92 (1892), and cases cited (*ante*, p. 253 and note). Power of Congress to impose a tax on the amount of notes of any State bank or State banking association, used for circulation: *Veazie Bank v. Fenno*, 8 Wallace, 533 (1869); affirmed, *National Bank v. United States*, 101 U. S. 1 (1879); *Head-Money Cases*, 112 U. S. 580-96 (1884); and comments of Miller, J., on the case of *Veazie Bank v. Fenno*, *supra*; *Weston v. City of Charleston*, 2 Peters, 249, *supra*; *Bank Tax Case*, 2 Wallace, 200 (1864); *Van Allen v. Assessors*, 3 Wallace, 573 (1865). Shares of stock in a national bank are not subject to taxation by the States without the consent of Congress: *Talbott v. Silver Bow County*, 139 U. S. 438-48 (1891), *Brewer, J.* Capitation State tax on interstate passengers invalid: *Crandall v. State of Nevada*, 6 Wallace, 35 (1867). Constitutional limits on power of taxation: See Thayer, *Cases on Constitutional Law*, 1190-1431; Russell, *Police Power of the State*, 154, 155.

REFERENCES TO WESTON AND OTHERS v. CITY OF CHARLESTON, IN MARSHALL MEMORIAL.

Judge William A. Ketcham, II, 294; Isaac N. Phillips, Esq., II, 390.

*THE ISSUE BY A STATE OF PAPER MONEY
ON THE CREDIT OF THE STATE IS THE
EMISSION OF "BILLS OF CREDIT," AND
VIOLATES THE CONSTITUTION OF THE
UNITED STATES.*

The next case — *Craig v. State of Missouri* — has the distinction of being the one that first determined the meaning of "bills of credit," as those words are used in the Constitution of the United States. Among the prohibitions upon the States in that instrument are the following: "No State shall coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts."¹

After a thorough consideration in the present case of the origin, cause and purpose of this prohibition and of the language in which it is expressed, the conclusion is reached that it was aimed at the creation on the credit of a State of paper money intended for circulation as currency among the people, whether interest-bearing or not, and whether made a lawful tender for debts or not. The judgment of the court that the certificates in question, issued under the Missouri Act of 1821, were "bills of credit" within the prohibitory clause of the Constitution, has, we believe, never been doubted. The decision in *Craig v. Missouri* was reviewed and reaffirmed four years later in *Byrne v. Missouri*.² These decisions effectually stopped the States from the *direct* creation and

¹ Const. U. S., art. I, sec. 10.

² 4 Peters, 40 (1834).

issue of paper currency on the credit of the State for circulation as money.

Instead of this, some States adopted the policy of chartering State banking corporations empowered to issue bills intended to circulate as currency. The general power of a State, in the absence of special restrictions in its own Constitution to charter such corporations not owned by the State itself, is not questioned.

Within a few years after the decision of *Craig v. Missouri* and of *Byrne v. Missouri*, there came before the Supreme Court the case of *Briscoe v. The Bank of Kentucky*.¹ The State of Kentucky chartered this bank, owned its capital stock, funds and securities, appointed its officers, authorized it to emit bills to circulate as money, made them a legal tender in payment on execution, and imposed a penalty for refusing to take them. The Kentucky case was first argued when Chief Justice Marshall was on the bench. A re-argument was ordered, but before it took place Marshall had been succeeded by Taney as Chief Justice, and there were other changes in the *personnel* of the court.

The majority of the court distinguished the Kentucky case from the Missouri cases, and held that as the Constitution of the United States did not forbid a State to incorporate such a bank, the State had, as an incident of sovereignty, the power to do so, and that bills issued by the bank on the credit of the bank, and containing no pledge of the credit of the State, were not bills of credit issued by a State on the faith of the State, and hence were not bills of credit within the prohibition of the Constitution of the United States. The majority opinion, delivered by Mr. Justice McLean, declared that *Craig v. Missouri*

¹ 11 Peters, 257 (1837).

did not conflict with the Kentucky case. Mr. Justice Story delivered an elaborate and vigorous dissent, containing this remarkable statement at its close: "Mr. Chief Justice Marshall is not here to speak for himself; and knowing full well the grounds of his opinion, in which I concurred, that this act is unconstitutional, I have felt an earnest desire to vindicate his memory from the imputation of rashness, or want of deep reflection. Had he been living he would have spoken in the joint names of us both."¹

¹Story, *Life and Letters*, II, ch. VI, pp. 259-277. Story dissented in three constitutional opinions at January term, 1837—*Miln v. New York* (11 Peters, 108), *Kentucky Bank Case* (Id. 257), and *Charles River Bridge Case* (Id. 420). Kent wrote Story June 23, 1837, and referred to the Bridge Case and Bank Case "as alarming and distressing." (Story, *Life and Letters*, II, 270.) Story declared, "There will not, I fear, ever in our day be any case in which a law of a State or of Congress will be declared unconstitutional, for the old constitutional doctrines are fast fading away. Indeed, on my return home, I came to the conclusion to resign. But my friends have interposed, and I shall remain on the Bench, at least for the present." (Letter May 10, 1837, Id. 272). "I am the last of the old race of judges. I stand their solitary representative with a pained heart, and a subdued confidence." (Id. 277.)

We may venture to remark that experience has shown that Justice Story's alarms were unfounded. It may, we think, safely be said that professional and public sentiment has sustained the decision in the *Charles River Bridge Case* and remains divided as to the question whether in principle the *Kentucky Bank Case* is in actual conflict with the *Missouri cases*. The doctrine in the *Miln case* as explained, adjusted and applied in subsequent cases is perhaps the wisest and best demarkation practicable between the competing powers of the Federal and State governments respecting the subject-matter involved,—the power of Congress over Commerce on the one hand and the Police power of the States on the other.

Craig and Others v. The State of Missouri.

January Term, 1830.

[4 Peters' Reports, 411-465.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

Certificates issued by the State of Missouri, in sums not exceeding ten dollars, nor less than fifty cents, receivable in payment of all State, county, and town dues, etc., the faith and funds of the State being pledged for their redemption, were held to be "bills of credit," the emission of which was prohibited by the Constitution of the United States.

A promissory note given to the State in exchange for such certificates is void.

It is not necessary that the record should state, in terms, that the validity of a State law was questioned on the ground of its repugnancy to the Constitution of the United States; it is sufficient if the record shows it must have been so, and that the decision was in favor of the validity of the State law.

If, by consent, the court tried the case without a jury, the facts found by the court and placed on the record are to be considered as showing what questions were made.

In 1821 the State of Missouri established loan offices, from which certificates of indebtedness issued bearing two per cent. interest, and receivable for debts due the State. Craig and others borrowed some of these certificates, and gave their note therefor. The note was not

paid, and the State sued them. The State courts having decided against Craig, he sued out his writ of error to the United States Supreme Court¹ the opinion of which was given as follows:

MARSHALL, Chief Justice. This is a writ of error to a judgment rendered in the court of last resort, in the State of Missouri, affirming a judgment obtained by the State in one of its inferior courts against Hiram Craig and others, on a promissory note. Opinion.

The judgment is in these words: "And afterwards, at a court," etc., "the parties came into court by their attorneys, and, neither party desiring a jury, the cause is submitted to the court; therefore, all and singular the matters and things being seen and heard by the court, it is found by them that the said defendants did assume upon themselves, in manner and form as the plaintiff by her counsel alleged. And the court also find that the consideration, for which the writing declared upon and the assumpsit was made, was for the loan of loan-office certificates, loaned by the State at her loan office at Chariton; which certificates were issued, and the loan made, in the manner pointed out by an act of the Legis-

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

WILLIAM JOHNSON,

GABRIEL DUVAL,

JOSEPH STORY,

SMITH THOMPSON,

JOHN MCLEAN,

HENRY BALDWIN,

} *Associate Justices.*

Mr Justice Thompson, Mr. Justice Johnson and Mr. Justice McLean dissenting.

Mr. Sheffey appeared for plaintiff in error.

Mr. Thomas H. Benton for defendant in error.

lature of the said State of Missouri, approved the twenty-seventh day of June, 1821, entitled 'An Act for the Establishment of Loan Offices,' and the acts amendatory and supplementary thereto; and the court do further find that the plaintiff has sustained damages by reason of the non-performance of the assumptions and undertakings of them, the said defendants, to the sum of two hundred and thirty-seven dollars and seventy-nine cents, and do assess her damages to that sum. Therefore it is considered," &c.

The first inquiry is into the jurisdiction of the court.

The twenty-fifth section of the Judicial Act declares "that a final judgment or decree, in any suit in the highest court of law or equity of a State, in which a decision in the suit could be had, where is drawn in question" "the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision in favor of such their validity," "may be re-examined, and reversed or affirmed, in the Supreme Court of the United States."

To give jurisdiction to this court it must appear in the record, 1. That the validity of a statute of the State of Missouri was drawn in question, on the ground of its being repugnant to the Constitution of the United States; 2. That the decision was in favor of its validity.

1. To determine whether the validity of a statute of the State was drawn in question, it will be proper to inspect the pleadings in the cause, as well as the judgment of the court.

The declaration is on a promissory note, dated on the first day of August, 1822, promising to pay to the State

How the court gains jurisdiction in the case.

of Missouri, on the first day of November, 1822, at the loan office in Chariton, the sum of \$199.99, and the two per cent. per annum, the interest accruing on the certificates bor-

Pleadings in the cause and judgment of the Supreme Court of Missouri inspected.

rowed, from the first of October, 1821. This note is obviously given for certificates loaned under the "Act for the Establishment of Loan Offices." That act directs that loans on personal securities shall be made of sums less than \$200. This note is for \$199.99.

The act directs that the certificates issued by the State shall carry two per cent. interest from the date, which interest shall be calculated on the amount of the loan. The note promises to repay the sum, with the two per cent. interest, accruing on the certificates borrowed, from the first day of October, 1821. It cannot be doubted that the declaration is on a note given in pursuance of the act which has been mentioned.

History of the case.

Neither can it be doubted that the plea of non assumpsit allowed the defendants to draw into question, at the trial, the validity of the consideration on which the note was given. Everything which disaffirms the contract, everything which shows it to be void, may be given in evidence on the general issue in an action of assumpsit. The defendants, therefore, were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated.

By action of assumpsit defendants could question validity of consideration of the contract itself, and the constitutionality of the law in which it originated.

Have they done so?

Had the cause been tried before a jury, the regular course would have been to move the court to instruct the jury that the act of assembly, in pursuance of which the note was given, was repugnant to the Constitution of the

United States, and to except to the charge of the judges, if in favor of its validity; or a special verdict might have been found by the jury, stating the act of assembly, the execution of the note in payment of certificates loaned in pursuance of that act, and referring its validity to the court. The one course or the other would have shown that the validity of the act of assembly was drawn into question, on the ground of its repugnancy to the Constitution; and that the decision of the court was in favor of its validity. But the one course or the other would have required both a court and jury. Neither could be pursued where the office of the jury was performed by the court. In such a case, the obvious substitute for an instruction to the jury, or a special verdict, is a statement by the court of the points in controversy on which its judgment is founded. This may not be the usual mode of proceeding, but it is an obvious mode; and if the court of the State has adopted it, this court cannot give up substance for form.

The arguments of counsel cannot be spread on the record. The points urged in argument cannot appear. But the motives stated by the court on the record for its judgment, and which form a part of the judgment itself, must be considered as exhibiting the points to which those arguments were directed, and the judgment as showing the decision of the court upon those points. There was no jury to find the facts and refer the law to the court; but if the court which was substituted for the jury has found the facts on which its judgment was rendered, its finding must be equivalent to the finding of a jury. Has the court, then, substituting itself for a jury, placed facts

Review of the proceedings of Supreme Court of Missouri.

upon the record, which, connected with the pleadings, show that the act in pursuance of which this note was executed was drawn into question, on the ground of its repugnancy to the Constitution?

After finding that the defendants did assume upon themselves, etc., the court proceeds to find "that the consideration, for which the writing declared upon and the assumpsit was made, was the loan of loan-office certificates loaned by the State at her loan office *Idem.* at Chariton; which certificates were issued, and the loan made, in the manner pointed out by an act of the Legislature of the said State of Missouri, approved the 27th of June, 1821, entitled," etc.

Why did not the court stop immediately after the usual finding that the defendants assumed upon themselves? Why proceed to find that the note was given for loan-office certificates issued under the act contemplated to be unconstitutional, and loaned in pursuance of that act, if the matter thus found was irrelevant to the question they were to decide? *Idem.*

Suppose the statement made by the court to be contained in the verdict of a jury which concludes with referring to the court the validity of the note thus taken in pursuance of the act; would not such a verdict bring the constitutionality of the act, as well as its construction, directly before the court? We think it would; such a verdict would find that the consideration of the note was loan-office certificates, issued and loaned in the manner prescribed by the act. What could be referred to the court by such a verdict but the obligation of the law? It finds that the certificates for which the note was given were issued in pursuance of the act, and that *Idem.* the contract was made in conformity with it. Admit

the obligation of the act, and the verdict is for the plaintiff; deny its obligation, and the verdict is for the defendant. On what ground can its obligation be contested but its repugnancy to the Constitution of the United States? No other is suggested. At any rate it is open to that objection. If it be, in truth, repugnant to the Constitution of the United States, that repugnancy might have been urged in the State, and may, consequently, be urged in this court; since it is presented by the facts in the record, which were found by the court that tried the cause.

It is impossible to doubt that, in point of fact, the constitutionality of the act, under which the certificates were issued that formed the consideration of this note, constituted the only real question made by the parties, and the only real question decided by the court. But the record is to be inspected with judicial eyes; and as it does not state in express terms that this point was made, it has been contended that this court cannot assume the fact that it was made or determined in the tribunal of the State.

The record shows distinctly that this point existed, and that no other did exist; the special statement of facts made by the court, as exhibiting the foundation of its judgment, contains this point and no other. The record shows clearly that the cause did depend, and must depend, on this point alone.

If in such a case the mere omission of the court of Missouri to say, in terms, that the act of the Legislature was constitutional, withdraws that point from the cause, or must close the judicial eyes of the appellate tribunal upon it, nothing can be more obvious than that the provisions of the Constitution, and of an act of Congress, may be

always evaded; and may be often, as we think they would be in this case, unintentionally defeated.

But this question has frequently occurred; and has, we think, been frequently decided in this court. *Smith v. The State of Maryland*, 6 Cranch, 286; *Martin v. Hunter's Lessee*, 1 Wheaton, 355; *Miller v. Nicholls*, 4 Wheaton, 311; *Williams v. Norris*, 12 Wheaton, 117; *Willson et al. v. The Black Bird Creek Marsh Company*, 2 Peters, 245, and *Harris v. Dennie*, in this term, are all, we think, expressly in point. There has been perfect uniformity in the construction given by this court to the twenty-fifth section of the Judicial Act. That construction is that it is not necessary to state, in terms, on the record, that the Constitution, or a treaty, or law of the United States has been drawn in question, or the validity of a State law, on the ground of its repugnancy to the Constitution. It is sufficient if the record shows that the Constitution, or a treaty, or law of the United States must have been construed, or that the constitutionality of a State law must have been questioned; and the decision has been in favor of the party claiming under such law.

We think, then, that the facts stated on the record presented the question of repugnancy between the Constitution of the United States and the act of Missouri to the court for its decision. If it was presented, we are to inquire:

2. Was the decision of the court in favor of its validity?

The judgment in favor of the plaintiff is a decision in favor of the validity of the contract, and, consequently, of the validity of the law by the authority of which the contract was made.

The case is, we think, within the twenty-fifth section of the Judicial Act, and, consequently, within the jurisdiction of this court.

This brings us to the great question in the cause: Is the act of the Legislature of Missouri repugnant to the Constitution of the United States?

Great question is: Is the Act of the Legislature of Missouri repugnant to the Constitution?

The counsel for the plaintiffs in error maintain that it is repugnant to the Constitution, because its object is the emission of bills of credit contrary to the express prohibition contained in the tenth section of the first article.

The act under the authority of which the certificates loaned to the plaintiffs in error were issued was passed on the 26th of June, 1821, and is entitled "An Act for the Establishment of Loan Offices." The provisions that are material to the present inquiry are comprehended in the third, thirteenth, fifteenth, sixteenth, twenty-third and twenty-fourth sections of the act, which are in these words:

Certificates loaned under "An Act for the Establishment of Loan Offices."

Section the third enacts, "That the auditor of public accounts and treasurer, under the direction of the governor, shall, and they are hereby required to, issue certificates, signed by the said auditor and treasurer, to the amount of two hundred thousand dollars, of denominations not exceeding ten dollars, nor less than fifty cents (to bear such devices as they may deem the most safe), in the following form, to wit: "This certificate shall be receivable at the treasury, or any of the loan offices, of the State of Missouri, in the discharge of taxes or debts due to the State, for the sum of \$——, with interest for the same, at the rate of two per cent. per annum from this date, the —— day of ——, 182 ."

Wording of section 3 of said act.

The thirteenth section declares, "That the certificates of the said loan office shall be receivable at the treasury of the State, and by all tax-gatherers and other public officers, in payment of taxes or other moneys now due to the State or to any county or town therein, and the said certificates shall also be received by all officers civil and military in the State, in the discharge of salaries and fees of office."

Wording of section 13
of said act.

The fifteenth section provides, "That the commissioners of said loan offices shall have power to make loans of the said certificates to citizens of this State, residing within their respective districts only, and in each district a proportion shall be loaned to the citizens of each county therein, according to the number thereof," etc.

Wording of section 15
of said act.

Section sixteenth, "That the said commissioners of each of the said offices are further authorized to make loans on personal securities by them deemed good and sufficient, for sums less than two hundred dollars; which securities shall be jointly and severally bound for the payment of the amount so loaned, with interest thereon," etc.

Wording of section 16
of said act.

Section twenty-third, "That the general assembly shall, as soon as may be, cause the salt springs and lands attached thereto,

Wording of section 23
of said act.

given by Congress to this State, to be leased out, and it shall always be the fundamental condition in such leases, that the lessee or lessees shall receive the certificates hereby required to be issued, in payment for salt, at a price not exceeding that which may be prescribed by law; and all the proceeds of the said salt springs, the interest accruing to the State, and all estates purchased by officers of the said several offices, under the provisions of

this act, and all the debts now due or hereafter to be due to this State, are hereby pledged and constituted a fund for the redemption of the certificates hereby required to be issued, and the faith of the State is hereby also pledged for the same purpose."

Section twenty-fourth, "That it shall be the duty of the said auditor and treasurer to withdraw annually from circulation one-tenth part of the certificates which are hereby required to be issued," etc.

Wording of section 24
of said act.

The clause in the Constitution which this act is supposed to violate is in these words: "No State shall " "emit bills of credit."

No State shall emit
bills of credit.

What is a bill of credit? What did the Constitution mean to forbid?

In its enlarged and, perhaps, its literal sense, the term "bill of credit" may comprehend any instrument by which a State engages to pay money at a future day; thus including a certificate given for money borrowed. But the language of the Constitution itself, and the mischief to be prevented, which we know from the history of our country, equally limit the interpretation of the terms. The word "emit" is never employed in describing those contracts by which a State binds itself to pay money at a future day for services actually received, or for money borrowed for present use; nor are instruments executed for such purposes, in common language, denominated "bills of credit." To "emit bills of credit" conveys to the mind the idea of issuing paper intended to circulate through the community, for its ordinary purposes, as money, which paper is redeemable at a future day.

Bills of credit defined.

This is the sense in which the terms have been always understood.

At a very early period of our colonial history the attempt to supply the want of the precious metals by a paper medium was made History of bills of credit. to a considerable extent; and the bills emitted for this purpose have been frequently denominated "bills of credit." During the war of our revolution we were driven to this expedient, and necessity compelled us to use it to a most fearful extent. The term has acquired an appropriate meaning, and "bills of credit" signify a paper medium, intended to circulate between individuals, and between government and individuals, for the ordinary purposes of society. Such a medium has been always liable to considerable fluctuation. Its value is continually changing; and these changes, often great and sudden, expose individuals to immense loss, are the sources of ruinous speculations, and destroy all confidence between man and man. To cut up this mischief by the roots, a mischief which was felt through the United States and which deeply affected the interest and prosperity of all, the people declared, in their Constitution, that no State should emit bills of credit. If the prohibition means anything, if the words are not empty sounds, it must comprehend the emission of any paper medium, by a State government, for the purpose of common circulation.

What is the character of the certificates issued by authority of the act under consideration? What office are they to perform? Certificates, signed by the auditor and treasurer of the State, are to be issued by those officers to the amount of two hundred thousand dollars, of de-

Character of the certificates issued by authority of said act.

nominations not exceeding ten dollars, nor less than fifty cents. The paper purports on its face to be receivable at the treasury, or at any loan office of the State of Missouri, in discharge of taxes or debts due to the State.

The law makes them receivable in discharge of all taxes, or debts due to the State, or any county or town therein; and of all salaries and fees of office to all officers civil and military within the State, and for salt sold by the lessees of the public salt works. It also pledges the faith and funds of the State for their redemption.

Faith of the State
pledged for their re-
demption.

It seems impossible to doubt the intention of the Legislature in passing this act, or to mistake the character of these certificates, or the office they were to perform. The denominations of the bills, from ten dollars to fifty cents, fitted them for the purpose of ordinary circulation; and their reception in payment of taxes, and debts to the government and to corporations, and of salaries and fees, would give them currency. They were to be put into circulation, that is, emitted, by the government. In addition to all these evidences of an intention to make these certificates the ordinary circulating medium of the country, the law speaks of them in this character; and directs the auditor and treasurer to withdraw annually one-tenth of them from circulation. Had they been termed "bills of credit," instead of "certificates," nothing would have been wanting to bring them within the prohibitory words of the Constitution.

Intention of the Legis-
lature impossible to
misunderstand.

And can this make any real difference? Is the proposition to be maintained that the Constitution meant to prohibit names and not things? That a very important

act, big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name? That the Constitution, in one of its most important provisions, may be openly evaded by giving a new name to an old thing? We cannot think so. We think the certificates emitted under the authority of this act are as entirely bills of credit as if they had been so denominated in the act itself.

Their being designated "certificates" instead of "bills of credit" not sufficient to take them out of the clause of the Constitution prohibiting emission of bills of credit.

But it is contended that, though these certificates should be deemed bills of credit according to the common acceptance of the term, they are not so in the sense of the Constitution; because they are not made a legal tender.

That the certificates are not made a legal tender is immaterial.

The Constitution itself furnishes no countenance to this distinction. The prohibition is general. It extends to all bills of credit, not to bills of a particular description. That tribunal must be bold, indeed, which, without the aid of other explanatory words, could venture on this construction. It is the less admissible in this case because the same clause of the Constitution contains a substantive prohibition to the enactment of tender laws. The Constitution, therefore, considers the emission of bills of credit and the enactment of tender laws as distinct operations, independent of each other, which may be separately performed. Both are forbidden. To sustain the one because it is not also the other; to say that bills of credit may be emitted if they be not made a tender in payment of debts,—is, in effect, to expunge that distinct, in-

Prohibition under clause of Constitution is general.

dependent prohibition and to read the clause as if it had been entirely omitted. We are not at liberty to do this.

The history of paper money has been referred to for the purpose of showing that its great mischief consists in being made a tender; and that, therefore, the general words of the Constitution may be restrained to a particular intent.

Was it even true that the evils of paper money resulted solely from the quality of its being made a tender, this court would not feel itself authorized to disregard the plain meaning of words, in search of a conjectural intent to which we are not conducted by the language of any part of the instrument. But we do not think that the history of our country proves either that being made a tender in payment of debts is an essential quality of bills of credit or the only mischief resulting from them. It may, indeed, be the most pernicious; but that will not authorize a court to convert a general into a particular prohibition.

We learn from Hutchinson's History of Massachusetts, vol. 1, p. 402, that bills of credit were emitted for the first time in that colony in 1690.¹ An army returning unexpectedly from an expedition against Canada, which had proved as disastrous as the plan was magnificent, found the government totally unprepared to meet their claims. Bills of credit were resorted to for relief from this embarrassment. They do not appear to have been made a tender; but they were not on that account the less bills of credit, nor were they absolutely harmless. The emission, however, not being considerable, and the bills being soon

Evils of paper money
being made a tender.

Bills of credit first
emitted in Massachu-
setts in 1690.

¹ For a form of these first bills of credit see Story, Com., III, ch. XXXIII, § 1861, note.

redeemed, the experiment would have been productive of not much mischief had it not been followed by repeated emissions to a much larger amount. The subsequent history of Massachusetts abounds with proofs of the evils with which paper money is fraught, whether it be or be not a legal tender.

Paper money was also issued in other colonies, both in the north and south; and whether made a tender or not was productive of evils in proportion to the quantity emitted.¹

History of paper money and emission of bills of credit in America.

In the war which commenced in America in 1755, Virginia issued paper money at several successive sessions, under the appellation of treasury notes. This was made a tender. Emissions were afterwards made in 1769, in 1771 and in 1773. These were not made a tender; but they circulated together; were equally bills of credit; and were productive of the same effects. In 1775 a considerable emission was made for the purposes of the war. The bills were declared to be current, but were not made a tender. In 1776 an additional emission was made and the bills were declared to be a tender. The bills of 1775 and 1776 circulated together, were equally bills of credit, and were productive of the same consequences.

Congress emitted bills of credit to a large amount; and did not, perhaps could not, make them a legal tender. This power resided in the States. In May, 1777, the Legislature of Virginia passed an act, for the first time, making the bills of credit issued under the authority of Congress a tender, so far as to extinguish interest. It was not until March, 1781, that Virginia passed an act making all the bills of credit which had been emitted by Congress, and all which had been

Idem.

¹ See note at end of case.

emitted by the State, a legal tender in payment of debts. Yet they were in every sense of the word bills of credit previous to that time, and were productive of all the consequences of paper money. We cannot, then, assent to the proposition that the history of our country furnishes any just argument in favor of that restricted construction of the Constitution for which the counsel for the defendant in error contends.

The certificates for which this note was given being in truth "bills of credit" in the sense of the Constitution, we are brought to the inquiry,—

Is the note valid of which they form the consideration?

It has been long settled that a promise made in consideration of an act which is forbidden by law is void. It will not be questioned that an act forbidden by the Constitution of the United States, which is the supreme law, is against law. Now the Constitution forbids a State to "emit bills of credit." The loan of these certificates is the very act which is forbidden. It is not the making of them, while they lie in the loan offices, but the issuing of them, the putting them into circulation, which is the act of emission; the act that is forbidden by the Constitution. The consideration of this note is the emission of bills of credit by the State. The very act which constitutes the consideration is the act of emitting bills of credit, in the mode prescribed by the law of Missouri; which act is prohibited by the Constitution of the United States.

Cases which we cannot distinguish from this in principle have been decided in State courts of great respectability, and in this court. In the case of

Cases in point.

The Springfield Bank *v.* Merriek et al. (14 Mass. Reports, 322) a note was made payable in certain

bills, the loaning or negotiating of which was prohibited by statute, inflicting a penalty for its violation. The note was held to be void. Had this note been made in consideration of these bills, instead of being made payable in them, it would not have been less repugnant to the statute; and would, consequently, have been equally void.

In *Hunt v. Knickerbocker* (5 Johnson's Reports, 327) it was decided that an agreement for the sale of tickets in a lottery not authorized by the Legislature of the State, although instituted under the authority ^{Idem.} of the government of another State, is contrary to the spirit and policy of the law, and void. The consideration on which the agreement was founded being illegal, the agreement was void. The books, ^{Cases numerous to same effect.} both of Massachusetts and New York, abound with cases to the same effect. They turn upon the question whether the particular case is within the principle, not on the principle itself. It has never been doubted that a note given on a consideration which is prohibited by law is void. Had the issuing or circulation of certificates of this or of any other description been prohibited by a statute of Missouri, could a suit have been sustained in the courts of that State on a note given in consideration of the prohibited certificates? If it could not, are the prohibitions of the Constitution to be held less sacred than those of a State law?

It had been determined, independently of the acts of Congress on that subject, that sailing under the license of an enemy is illegal. *Patton v. Nicholson* (3 Wheaton's Reports, 204) was ^{Case of Patton v. Nicholson.} a suit brought in one of the courts of this district on a note given by Nicholson to Patton, both citizens of the

United States, for a British license. The United States were then at war with Great Britain; but the license was procured without any intercourse with the enemy. The judgment of the Circuit Court was in favor of the defendant, and the plaintiff sued out a writ of error. The counsel for the defendant in error was stopped, the court declaring that the use of a license from the enemy being unlawful, one citizen had no right to purchase from or sell to another such a license to be used on board an American vessel. The consideration for which the note was given being unlawful, it followed, of course, that the note was void.

A majority of the court feels constrained to say that the consideration on which the note in this case was given is against the highest law of the land, and that the note itself is utterly void. In rendering judgment for the plaintiff, the court for the State of Missouri decided in favor of the validity of a law which is repugnant to the Constitution of the United States.

In the argument, we have been reminded by one side of the dignity of a sovereign State, of the humiliation of her submitting herself to this tribunal, of the dangers which may result from inflicting a wound on that dignity;¹ by the other, of the still superior dignity of the people of the United States, who have spoken their will in terms which we cannot misunderstand.

¹This obviously refers to Col. Benton's complaint that the language of the writ of error by which "the State of Missouri was 'summoned,' 'commanded,' and 'enjoined' to appear in court, did not seem proper when addressed to a sovereign State." "The State has done no act," he declared, "which was not within the full and ample powers she possesses as a free, sovereign and independent State," etc., etc. Marshall's answer to these observations is admirable for its lofty dignity and perfect propriety.

To these admonitions we can only answer, that, if the exercise of that jurisdiction which has been imposed upon us by the Constitution and laws of the United States shall be calculated to bring on those dangers which have been indicated; or if it shall be indispensable to the preservation of the Union, and, consequently, of the independence and liberty of these States; these are considerations which address themselves to those departments which may with perfect propriety be influenced by them. This department can listen only to the mandates of law; and can tread only that path which is marked out by duty.

The judgment of the Supreme Court of the State of Missouri for the first judicial district
 is reversed; and the cause remanded,
 with directions to enter judgment for the defendants.

Judgment of court below reversed.

NOTE.

Commenting on this case Thorpe says: "It would have been well for the country had no departure from this decision (*Craig v. Missouri*) ever been made, but seven years later, amidst the terrible excitement of the panic of 1837, the court, in *Briscoe v. Bank of Kentucky*, made a subtle distinction between a State and a corporation, meaning a bank which issues bills of credit, holding that the notes on the bank which the Commonwealth of Kentucky issued were not bills of credit, for they were not emitted by the State upon its credit but upon the credit of the funds of the bank. . . . Even in becoming the exclusive stockholder in this bank, the State imparted to it no attributes of sovereignty. Mr. Justice McLean delivered the opinion of the court. Its membership had greatly changed. Marshall was dead, and his associates, who had held to his views, save Joseph Story, had also passed away." Thorpe, *Const. Hist. of U. S.*, II, 510, 512.

Referring to the principle laid down in *Briscoe v. Bank of Kentucky*, Mr. Justice Miller says: "The exercise of

this power of creating a bank with power to issue circulating notes, in which, although the bank assumes the nature and character of a corporation doing business in the name of trustees and directors, yet the State itself is the sole owner of the capital stock, is more doubtful and probably would not be sustained at this day." Const. of U. S. 583. Professor Thayer's comment on *Craig v. Missouri* is that "soon after Marshall's death a different doctrine was established by the court,—wisely it would seem,—and has ever since been maintained," but he adds in a note, "see, however, Chancellor Kent in 2 N. Y. Review, 372." Thayer, John Marshall, 94. So Carson says: "The conclusion reached in *Briscoe v. Kentucky* is in direct conflict with *Craig v. Missouri*." Hist. Sup. Court U. S. 305. But the majority of the court stated that it did not so consider it. See *supra*, pp. 618, 619, and note.

"It is clear," says Mr. Tucker, "from our whole history under the Confederation, and from the debates in the Federal Convention and the character of the Constitution, that:

"(1) The word 'coin' cannot apply to paper; it applies to metals. (2) The Confederation had power to coin money, to borrow money, and to emit bills. The distinction is here drawn between coining money and emitting bills. Therefore neither is included in the other. (3) The Constitution of the United States, in the clause above quoted, draws the same distinction. Congress has power to borrow money—to emit bills being included; and to coin money. This enforces the same distinction. (4) An emitted bill is a promise to pay money, but it is not money; therefore to emit bills is not to coin money. (5) The States are forbidden to emit bills or to coin money, or to make anything but gold and silver coin a tender. If to coin money be inclusive of to emit bills, why is the proposition repeated? (6) Congress has power to provide for punishing the counterfeiting of the securities and current coin of the United States. These securities must either be the bonds or the bills of the government. The powers to punish the counterfeiting of these and of current coin are distinct, and neither is included in the other.

"The conclusion is absolute that under the power to coin money Congress cannot emit bills. The power to

emit bills is included in the power to borrow money. The coin struck by Congress of gold and silver is 'current' by the very terms of the Constitution, and the States can make nothing but coin a legal tender. The power to emit bills is not to make them current, but is a mode of borrowing. If by the Constitution the bills were current coin, then they might be claimed to be constitutionally legal tender, but being a mode of borrowing they are no part of the currency of the country.

"Taking all these clauses together, the true construction may be thus stated: The power to emit bills by Congress is inferred only as a means of borrowing money. The States are forbidden to emit bills of credit, which means bills intended as a currency.¹ But States may emit bills not intended as currency." Tucker, Const. of U. S., II, 513, 514.

Coupons for interest on bonds of Virginia, whereby the State promises to pay to the bearer a certain amount due as interest on a certain day, and making them receivable at maturity for taxes due the State, are not bills of credit within the meaning of the Constitution of the United States, inasmuch as said coupons are not intended to circulate as money. *Poindexter v. Greenhow*, 114 U. S. 270 (1885); *Id.* 390; *Allen v. Baltimore & Ohio Railroad Company*, 114 U. S. 311 (1886); *Chaffin v. Taylor*, 116 U. S. 567.

Refunding bond scrip of the State of South Carolina issued under an act of the State in denominations as small as one dollar, bearing no interest, and no date of payment fixed, but containing a pledge of the funds and faith of the State for their ultimate redemption, receivable as taxes and when received authorized to be re-issued in satisfaction of claims against the State, were held to be intended for circulation as money, and to constitute bills of credit within the meaning of the prohibition of the United States Constitution, and therefore void. See *Wesley v. Eels*, 177 U. S. 270, and cases there cited.

¹ *Craig v. Missouri*, 4 Pet. 411. See also *Woodruff v. Trapnall*, 10 How. 190, 209; *Darrington v. State Bank of Alabama*, 13 How. 12; *Curran v. Arkansas*, 15 How. 804, 817; *Bailey v. Milner*, 85 Ga. 380; *Bank v. Mahan*, 21 La. Ann. 751.

"What was meant by the phrase 'bills of credit' in this clause of the Constitution has been the subject of very considerable discussion. The constitutional meaning of the phrase was perhaps best defined in the case of *Craig v. State of Missouri*." Miller, Const. of U. S. 581. What are not bills of credit. *McCoy v. Washington County*, 3 Wall. Jr. 381; *Bailey v. Milner*, 1 Abbott (U. S.), 261; s. c., 35 Ga. 330. Discussion of this subject: Kent, Com. (12th Ed.), I, 408, notes *a* and *c*; Story, Com. on Const., III, ch. XVII, § 1111 *et seq.*; Van Santvoord, Lives of Chief Justices, 480; Webster's Works (Ed. 1851), IV, 336, 337 (Speech on the Currency, 1837); Id., VI, 537, Letter to Baring Brothers & Co., 1839, wherein Mr. Webster substantially adopts Marshall's definition of bills of credit. Review of "Wild Cat Currency": Von Holst, Const. Law of U. S. 126, note; McMaster, Hist. of People of U. S., V, 160 *et seq.*; Bancroft, Hist. of Const. of U. S., I, book 2, ch. 6; Author's Last Revise, VI, 167; Thorpe, Const. Hist. of U. S., II, 510 *et seq.*; Thayer, Cases on Constitutional Law, Part IV, 2197-2199.

It is the established law of this country that Congress may emit bills. Chief Justice Chase, in *Veazie Bank v. Fenno*, 8 Wallace, 533-548, giving the opinion of the court, said: "It is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit."

For famous Legal Tender Cases, see *Hepburn v. Griswold*, 8 Wallace, 603 (1870); *Knox v. Lee*, 12 Wallace, 457 (1872); *Julliard v. Greenman*, 110 U. S. 421; Thayer, Cases on Constitutional Law, Part IV, note, pp. 2267-2273; Smucker's Life of Salmon P. Chase, chapter XXVIII, 258-268, with which ought to be read the secret history of the conferences of the Supreme Court in the form of a "Statement of Facts," April 30, 1870, signed by a majority of the court, relating to the rehearing and final decision of the Legal Tender Cases in 1870, see Miscellaneous Writings of Joseph P. Bradley (Newark, 1902), 45-74, which gives for the first time the history and text of this deeply interesting and important document.

REFERENCES TO CRAIG AND OTHERS *v.* THE STATE OF MISSOURI, IN MARSHALL MEMORIAL.

"Under the powers surrendered by the States to the General Government by section 10 of article I was the right to emit bills of credit; and the State of Missouri passed an act establishing loan offices and authorizing the issue of certificates of stock, receivable in payment of taxes and debts due the State. The Chief Justice delivered the opinion of the court, in which it was held that this was unconstitutional, as in reality authorizing the issue of bills of credit. A few years afterwards his successor, Chief Justice Taney, his equal in all the beautiful virtues of private life, in knowledge of the law, in facility of expression, but reared in a different school, a strict constructionist of Federal powers, held that a State might incorporate a bank and own all the stock, and its issue of bank bills was not in violation of this provision of the Constitution." (*Briscoe v. Bank*, 11 Pet. 257.) *Judge James C. MacRae*, II, 83, 84; *Hampton L. Carson, Esq.*, II, 261; *Judge William A. Ketcham*, II, 295.

"In *Craig* and others against the State of Missouri, under the clause forbidding a State to emit bills of credit, Marshall annulled a law of that State which authorized the issue of loan certificates which were held to come within the prohibited description." *Hon. Henry Cabot Lodge*, II, 331.

"In *Craig v. State of Missouri*, Marshall held void a device of the State of Missouri designed for emitting 'bills of credit' under the name of 'certificates of stock.' 'Is the proposition to be maintained,' asked Marshall, 'that an act big with great and ruinous mischief, which is expressly forbidden by words most appropriate for its description, may be performed by the substitution of a name?'" *Isaac N. Phillips, Esq.*, II, 391; *Judge Cornelius H. Hanford*, III, 251.

**TAXATION BY A STATE OF CORPORATIONS
CHARTERED BY IT, WHERE THERE IS NO
EXPRESS CONTRACT FOR EXEMPTION FROM
TAXATION, DOES NOT VIOLATE THE CON-
TRACT CLAUSE OF THE FEDERAL CONSTI-
TUTION.**

The next case — *Providence Bank v. Billings* — establishes the proposition that a State by granting a corporate charter to a private corporation does not thereby impliedly relinquish or contract away its power to tax the capital stock or property of such corporation.

Invoking the principle of the *Dartmouth College Case*¹ and applying the famous *dictum* of the Chief Justice in *M'Culloch v. Maryland* and *Osborn v. Bank*, that the unrestricted power to tax involves the power to destroy,² the counsel for the *Providence Bank* claimed that if a State chartered a bank, and the charter was silent as to the State's power to tax, the legal effect was that stock and property of the bank could not be taxed even in common with all other property within the State, since the power to tax could be carried to the point of destruction. The Chief Justice in the following opinion answers this contention of counsel, and lays down the proposition, now fundamental in our jurisprudence, that an exemption from the State's power of taxation as to any subject or object to which it extends³ will never be implied from

¹ *Ante*, pp. 299-338.

² *Ante*, pp. 287, 502, 503.

³ But without the consent of Congress the State's power of taxation does not extend to United States securities (*Weston v. Charles-*

the mere granting of a corporate charter; nor will the power of taxation by the State be deemed to be relinquished or abandoned unless the exemption is expressly granted by the charter of the corporation or by unmistakable legislative enactment. The cases in the Supreme Court taken together, while they agree that there may be a valid legislative contract for a consideration received, or supposed to be received, for a tax exemption, nevertheless require that "there must be a consideration so that the State can be supposed to have received a beneficial equivalent; for it is conceded on all sides that if the exemption is made as a privilege only, it may be revoked at any time."¹

Providence Bank v. Billings and Pittman.

January Term, 1830.

[4 Peters' Reports, 514-565.]

The proposition of law decided is thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

A law of the State of Rhode Island, imposing a tax upon the capital stock of a bank [chartered by the State], does not impair the obligation of the contract arising from its charter, which contains no stipulation on the subject of taxation.

ton, *ante.*) or shares of stock in a national bank. *Talbott v. Silver Bow County*, 139 U. S. 438, 440 (1891), *Brewer, J.*; *Bank Tax Case*, 2 Wall. 200 (1864); *Van Allen v. Assessors*, 3 Wall. 573 (1865). See *M'Culloch v. Maryland*, *ante*, pp. 252-298, and notes; *Osborn v. Bank*, *ante*, pp. 468-511, and notes.

¹ Cooley, *Const. Lim.* *281, where the leading cases are cited; *Hare*, *Am. Const. Law*, II, 664; *Thayer*, *Cases on Const. Law*, pp. 1190-1431, and notes; *Russell*, *Police Power of the State*, 105, 121, 122, 131.

The facts of this case are so fully set forth in the following opinion of the court¹ that no abstract is needed:

MARSHALL, Chief Justice. This is a writ of error to a judgment rendered in the highest court for the State of Rhode Island, in an action of trespass brought by the plaintiff in error against the defendant.

Statement of facts. In November, 1791, the Legislature of Rhode Island granted a charter of incorporation to certain individuals who had associated themselves together for the purpose of forming a banking company. They are incorporated by the name of the "President, Directors, and Company of the Providence Bank;" and have the ordinary powers which are supposed to be necessary for the usual objects of such associations.

In 1822 the Legislature of Rhode Island passed "An Act imposing a Duty on Licensed Persons and others, and Bodies Corporate within the State;" in which, among other things, it is enacted "that there shall be paid, for the use of the State, by each and every bank within the State, except the Bank of the United States, the sum of fifty cents on each and every thousand dollars of the capital stock actually paid in." This tax was afterwards augmented to one dollar and twenty-five cents.

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice*.

WILLIAM JOHNSON,

GABRIEL DUVALL,

JOSEPH STORY,

SMITH THOMPSON,

JOHN MCLEAN,

HENRY BALDWIN,

} *Associate Justices.*

Mr. Whipple appeared for plaintiff in error.

Mr. Haggard and Mr. Jones for the defendants.

The Providence Bank, having determined to resist the payment of this tax, brought an action of trespass against the officers, by whom a warrant of distress was issued against and served upon the property of the bank in pursuance of the law. The defendants justify the taking, set out in the declaration, under the act of assembly imposing the tax; to which plea the plaintiffs demur, and assign for cause of demurrer that the act is repugnant to the Constitution of the United States, inasmuch as it impairs the obligation of the contract created by their charter of incorporation. Judgment was given by the court of common pleas in favor of the defendants; which judgment was, on appeal, confirmed by the Supreme Judicial Court of the State. That judgment has been brought before this court by a writ of error.

Plaintiffs contend tax is in violation of art. 1, sec. 10, of the Constitution of the United States.

It has been settled that a contract entered into between a State and an individual is as fully protected by the tenth section of the first article of the Constitution as a contract between two individuals; and it is not denied that a charter incorporating a bank is a contract. Is this contract impaired by taxing the banks of the State?

This question is to be answered by the charter itself.

It contains no stipulation promising exemption from taxation. The State, then, has made no express contract which has been impaired by the act of which the plaintiffs complain. No words have been found in the charter which, in themselves, would justify the opinion that the power of taxation was in the view of either of the parties; and that an exemption of it was intended, though not expressed.¹ The plaintiffs find great difficulty in show-

The State has made no express contract which has been impaired.

¹ See notes at end of case.

ing that the charter contains a promise, either express or implied, not to tax the bank. The elaborate and ingenious argument which has been urged amounts, in substance, to this: The charter authorizes the bank to employ its capital in banking transactions, for the benefit of the stockholders. It binds the State to permit these transactions for this object. Any law arresting directly the operations of the bank
Plaintiffs' argument. would violate this obligation, and would come within the prohibition of the Constitution. But, as that cannot be done circuitously which may not be done directly, the charter restrains the State from passing any act which may indirectly destroy the profits of the bank. A power to tax the bank may, unquestionably, be carried to such an excess as to take all its profits, and still more than its profits, for the use of the State; and, consequently, destroy the institution. Now, whatever may be the rule of expediency, the constitutionality of a measure depends not on the degree of its exercise, but on its principle. A power, therefore, which may, in effect, destroy the charter, is inconsistent with it, and is impliedly renounced by granting it. Such a power cannot be exercised without impairing the obligation of the contract. When pushed to its extreme point, or exercised in moderation, it is the same power, and is hostile to the rights granted by the charter. This is substantially the argument for the bank. The plaintiffs cite and rely on several sentiments expressed on various occasions by this court, in support of these positions.

The claim of the Providence Bank is certainly of the first impression. The power of taxing moneyed corporations has been frequently exercised; and has never be-

fore, so far as is known, been resisted. Its novelty, however, furnishes no conclusive argument against it.

That the taxing power is of vital importance, that it is essential to the existence of gov-

ernment, are truths which it cannot be necessary to reaffirm. They are

Taxing power essential to the existence of government.

acknowledged and asserted by all. It would seem that the relinquishment of such a power is never to be assumed. We will not say that a State may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the State to abandon it does not appear.

The plaintiffs would give to this charter the same construction as if it contained a clause exempting the bank from taxation on its stock in trade. But can it be supposed that such a clause would not enlarge its privileges? They contend that it must be implied; because the power to tax may be so wielded as to defeat the purpose for which the charter was granted. And may not this be said with equal truth of other legislative powers? Does it not also apply with equal force to every incorporated company? A company may be incorporated for the purpose of trading in goods as well as trading in money. If the policy of the State should lead to the imposition of a tax on unincorporated companies, could those which might be incorporated claim an exemption, in virtue of a charter which does not indicate such an intention? The time may come when a duty may be imposed on manufactures. Would an incorporated company be exempted from this duty as the mere consequence of its charter?

The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men. This capacity is always given to such a body. Any privileges which may exempt it from the burdens common to individuals do not flow necessarily from the charter, but must be expressed in it, or they do not exist.

Exemption from taxation must be express. It cannot be implied from mere act of incorporation.

If the power of taxation is inconsistent with the charter, because it may be so exercised as to destroy the object for which the charter is given, it is equally inconsistent with every other charter, because it is equally capable of working the destruction of the objects for which every other charter is given. If the grant of a power to trade in money to a given amount implies an exemption of the stock in trade from taxation, because the tax may absorb all the profits, then the grant of any other thing implies the same exemption, for that thing may be taxed to an extent which will render it totally unprofitable to the grantee. Land, for example, has in many, perhaps in all, the States been granted by government since the adoption of the Constitution. This grant is a contract, the object of which is that the profits issuing from it shall inure to the benefit of the grantee. Yet the power of taxation may be carried so far as to absorb these profits. Does this impair the obligation of the contract? The idea is rejected by all, and the proposition appears so extravagant that it is difficult to admit any resemblance in the cases. And yet, if the proposition for which the plaintiffs contend be true, it carries us to this point. That proposition is, that a power which is in itself capable of being exerted to the total destruction of the grant, is inconsistent with the grant, and is, therefore,

impliedly relinquished by the grantor, though the language of the instrument contains no allusion to the subject. If this be an abstract truth, it may be supposed universal. But it is not universal, and therefore its truth cannot be admitted, in these broad terms, in any case. We must look for the exemption in the language of the instrument, and, if we do not find it there, it would be going very far to insert it by construction.

The power of legislation, and, consequently, of taxation, operates on all the persons and property belonging to the body politic.

Power of taxation operates on all persons and property of the body politic.

This is an original principle, which has its foundation in society itself. It is granted by all, for the benefit of all. It resides in government as a part of itself, and need not be reserved, when property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens; and that portion must be determined by the Legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish the corrective for every abuse of power which may be committed by the State governments. The interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security, where there is no express contract, against unjust and excessive taxation, as well as against unwise legislation generally.

This principle was laid down in the case of *M'Culloch v. The State of Maryland*,¹ and in *Osborn et al. v. The Bank of the United States*.²

Principle laid down in *M'Culloch v. Maryland* and *Osborn v. The Bank of United States*.

¹ *Ante*, pp. 252-298, and notes.

² *Ante*, pp. 468-511, and notes.

Both those cases, we think, proceeded on the admission that an incorporated bank, unless its charter shall express the exemption, is no more exempted from taxation than an unincorporated company would be, carrying on the same business.

The case of *Fletcher v. Peck*¹ has been cited; but in that case the Legislature of Georgia passed an act to annul its grant. The case of the State of New Jersey *v. Wilson* has been also mentioned; but in that case the stipulation exempting the land from taxation was made in express words.

Fletcher v. Peck and State of New Jersey v. Wilson distinguished.

The reasoning of the court in the case of *M'Culloch v. The State of Maryland* has been applied to this case; but the court itself appears to have provided against this application. Its opinion in that case, as well as in *Osborn et al. v. The Bank of the United States*, was founded expressly on the supremacy of the laws of Congress, and the necessary consequence of that supremacy to exempt its instruments, employed in the execution of its powers, from the operation of any interfering power whatever. In reasoning on the argument that the power of taxation was not confined to the people and property of a State, but might be exercised on every object brought within its jurisdiction, this court admitted the truth of the proposition, and added, that "the power was an incident of sovereignty, and was co-extensive with that to which it was an incident." "All subjects," the court said, "over which the sovereign power of a State extends, are objects of taxation." "The sovereignty of a State extends to everything which exists by its own authority, or is introduced

M'Culloch and Osborn cases distinguished.

¹ *Ante*, pp. 194-217, and notes.

by its permission; but does it extend to those means which are employed by Congress to carry into execution powers conferred on that body by the people of the United States? We think not."

So in the case of *Osborn v. The Bank of the United States*, the court said, "the argument" in favor of the right of the State to tax the bank "supposes the corporation to have been originated for the management of an individual concern, to be founded upon contract between individuals, having private trade and private profit for its great end and principal object.

"If these premises were true, the conclusion drawn from them would be inevitable. This mere private corporation, engaged in its own business, would certainly be subject to the taxing power of the State as any individual would be."

The court was certainly not discussing the question whether a tax imposed by a State on a bank chartered by itself impaired the obligation of its contract; and these opinions are not conclusive as they would be had they been delivered in such a case; but they show that the question was not considered as doubtful, and that inferences, drawn from general expressions pointed to a different subject, cannot be correctly drawn.

We have reflected seriously on this case, and are of opinion that the act of the Legislature of Rhode Island, passed in 1822, impos-
Act of Rhode Island of 1822 valid.
ing a duty on licensed persons and others, and bodies corporate within the State, does not impair the obligation of the contract created by the charter granted to the plaintiffs in error. It is therefore the opinion of this court that there is no error in the judgment of the Supreme Judicial Court for the State of Rhode Island,

affirming the judgment of the Court of Common Pleas in this case; and the same is affirmed; and the cause is remanded to the said Supreme Judicial Court that its judgment may be finally entered.

NOTE.

"It has been so often decided by the Supreme Court of the United States that an agreement by a State for a consideration received, or supposed to be received, that certain property, rights or franchises shall be exempt from taxation, or be taxed only at a certain agreed rate, is a contract protected by the Constitution, that the question can no longer be considered an open one." Cooley, Const. Lim. *280, *281. "But the intention of the State to surrender irrevocably the power of taxation must be explicit and certain." *Id.*

Conformably to the principles of the foregoing opinion of the Chief Justice in *The Bank v. Billings*, the existing doctrine is that exemptions from taxation will "be considered as a personal privilege not extending beyond the immediate grantee, unless otherwise so declared in express terms." "They are not to be extended beyond the exact and express language used, construed *strictissimi juris*." ¹

¹ Thayer, "John Marshall," 92; Thayer, *Cases Const. Law*, 1190-1431; Cooley, *Taxation* (2d ed.), 215; Carson, *Hist. Sup. Court*, 264. As to effect of the Fourteenth Amendment on the power of taxation by the States, see Guthrie, *Lectures on the Fourteenth Amendment*, 95 *et seq.*, 114 *et seq.*, 136-142.

**CONSTITUTIONAL RELATION BETWEEN THE
GENERAL GOVERNMENT, THE SEVERAL
STATES OF THE UNION, AND THE IN-
DIAN TRIBES—NATIONAL AUTHORITY SU-
PREME—JURISDICTION OF THE SUPREME
COURT.**

The next two cases — *Cherokee Nation v. Georgia* and *Worcester v. Georgia* — have proved permanently important as defining and establishing the constitutional relations between the General Government and the Indian tribes or nations within the limits of the United States, and the legal relations of the several States within which Indian tribes may reside towards such tribes while maintaining their tribal condition. The extrinsic circumstances invest these cases with an unusual and almost dramatic interest.

In determining the status of the Indian tribes the court, in the case first above mentioned, decided a question of great moment, touching its own original jurisdiction under the Constitution of the United States. The Judiciary Article of the Constitution invests the Supreme Court, *inter alia*, with original jurisdiction over “controversies between a State . . . and foreign States,” and also gives the Supreme Court jurisdiction in all cases in which a State of the Union shall be a party. The court held that even if it were true that the Cherokee Nation or tribe was a State in the general sense of being a distinct political society managing its own affairs, it was nevertheless not a State of the Union or a foreign

State in the sense of the Constitution. That proposition has never since been contested or denied, and it underlies or is implied in all the subsequent legislation of Congress in respect of Indians.

In the other case the court held under the Constitution and laws of the United States and the numerous treaties between the United States and the Cherokee Indians that the Cherokee Nation was not sovereign, was not a "State" in the sense in which that word is used in the Constitution of the United States, that the Indian tribes were by the Constitution placed under the exclusive power of Congress, and that the several States within whose geographical limits they resided had no jurisdiction over them. As a result of this view, the court decided that the statutes of Georgia which subjected to criminal punishment all white persons residing within the limits of the Cherokee Nation without the consent of that State, authorized their arrest and forcible removal from the Indian territory, trial in the courts of the State, and punishment under State authority, were in violation of the Constitution, treaties and laws of the United States, and consequently void.

Few questions in the eventful history of the Supreme Court attracted more attention or excited deeper interest at the time than those presented in these two cases.¹ Unfortunately the controversy between Georgia and the Cherokee Nation came to have a political as well as a legal side. We here outline the facts only so far as they serve

¹ This "romantic and eventful chapter in the history of the nation," memorable in so many ways, is well though succinctly treated by Carson in his *History of the Supreme Court*, pp. 267, 269, 511, 629, 642. See also Van Santvoord, *Lives of Chief Justices*, 430-436; McMaster, *History of the People of the United States*, V, 175-178, 537-540, and other authorities cited *infra*.

to bring more distinctly into view the circumstances under which the two following opinions of Chief Justice Marshall were rendered, in order to enable the reader to appreciate their greatness and judicial merits, the force of the reasoning and the soundness of the conclusions reached by the court. This attempt to give the case a proper setting is thought needful because, as is usual with Chief Justice Marshall, the decisions themselves are so free from any partisan or party bias that no one reading them would have the least idea of the widespread and great public and political excitement which attended this controversy, or that it was known, or at least generally believed, that the State would refuse to obey any adverse judgment of the court, and that the administration then in power would probably refuse to execute such judgment. Marshall's courage in the performance of duty never faltered.¹

The Cherokees were originally a large, powerful tribe, and in the course of some thirty years had entered into a dozen or more treaties with the United States, many of them ceding lands to the General Government; among others, an important treaty in 1802 making a large cession of territory to the United States, upon two conditions: 1st, the United States should for the benefit of Georgia extinguish the Indian title to the remaining Indian lands within the limits of that State "as soon as it could be done peaceably and on reasonable terms;" 2d, the United States stipulated and guaranteed that "the utmost good faith was always to be observed toward the Indians; that in their property, rights, and liberty they shall never be invaded or disturbed unless in just wars authorized by Congress, and that their lands and prop-

¹ Marshall Memorial, I, 382, 383 (Dillon).

erty should never be taken from them without their consent," etc. In 1817 half of the tribe of the Cherokees was induced to emigrate to and settle beyond the Mississippi River, west of Arkansas, in what is known as the Indian Territory. The rest of the tribe, however, continued to remain within the limits of Georgia and were gradually adopting the habits, customs, arts and occupations of civilized people. Georgia was rapidly filling up with white inhabitants, pressing upon the Indian reservation, and a state of hostility existed between the whites and the Cherokee Nation. The Indian race is intractable, and the mournful history of the Indians in this country shows that the Indians, while maintaining their tribal government, and the whites cannot live in peace as neighbors. Under such circumstances the Indian is doomed either to destruction, absorption or expulsion.

Against the repeated and earnest remonstrances of Georgia the Federal Government for more than twenty-five years had failed to extinguish the Indian title.

In 1828 the Cherokees, aided by white men and missionaries, adopted a Constitution for a permanent government. At this Georgia took fire. The excitement in the State was intense and finally found expression in two acts of the State Legislature, drastic, proscriptive, "thorough," which took effect in 1829 and 1830. These abrogated and declared void all Cherokee laws, rules and usages within the limits of their own territory.¹ The Cherokee country was divided into sections and annexed for all legal and judicial purposes to the adjacent counties, and the entire body of the laws of Georgia was extended over this territory and over the Indians and all

¹ The State Acts of 1829 and 1830 are given at large in the report of the case of *Worcester v. Georgia*, 6 Peters, 521-532.

persons residing therein. Indians were disqualified as witnesses in any case in which a white man not a resident with the tribe was a party. No white man was allowed to reside among the Indians without a special license from the Governor of the State and without taking an oath to obey the Constitution and laws of Georgia, and in case this law was violated the offense was punishable by a sentence to hard labor in the penitentiary of the State for not less than four years. It was under this provision of this sweeping and proscriptive statute that Worcester and several other white persons were indicted in the State courts, found guilty and sentenced to four years' imprisonment, even though Worcester was a missionary to the Cherokee Nation, duly authorized and sent out by the American Board of Foreign Missions and under the authority of the President of the United States, and was at the time of his arrest engaged in preaching the Gospel and in translating the Scriptures into the Indian tongue and resided there with the permission and approval of the Cherokee nation.

In the country at large sympathy with the missionaries was universal and profound, for being held criminals in obeying their Master's command to preach the Gospel to every creature.

In Georgia the hostility towards the missionaries was specially intense because "it was believed, and perhaps justly," says Mr. Kennedy, "that but for them the tribe would have yielded to the wishes of the Government and have gone peaceably to the new home (west of the Mississippi) provided for them."¹ The report of the Secretary of War in 1828 expressly so charged.

The State of Georgia in all of its departments, legis-

¹Kennedy, *Life of William Wirt*, 320.

lative, executive and judicial, asserted that the sovereignty of the State extended over all territory within its geographical limits, including that occupied by the Indians under their original title and under treaties with the United States, and over the Indians themselves, and all other persons within the State. One Corn Tassels, an Indian, or of Indian descent, committed homicide in resisting the execution of these laws, was tried in the State court, condemned and hanged, although a writ of error had been granted by the Supreme Court of the United States.¹

Jackson's administration avowedly took sides with Georgia, and in the President's message, 1829-30, he stated that he had so informed the Indians and had "advised them to emigrate beyond the Mississippi or submit to the laws of the State." This information had been communicated by the President to the Cherokees through the Secretary of War in an elaborate opinion.²

In their extremity the Cherokees consulted two of the most eminent counsel in the country, William Wirt and John Sergeant. After much deliberation they concluded to bring a bill in equity, originally in the Supreme Court of the United States, in the name of the Cherokee Nation, against the State of Georgia, alleging and claiming that

¹ These facts are alleged in the bill in the case of the Cherokee Nation v. Georgia, 5 Peters, 1.

² The bill in the case of the Cherokee Nation v. Georgia averred that the Cherokees, being "unwilling to resist by force of arms the efforts of Georgia to force the Indians from the Territory, made application for protection and for the execution of the guaranty of the treaties to the President of the United States, and received for answer that 'the President of the United States has no power to protect them against the laws of Georgia.'" 5 Peters, 9. See also McMaster, Hist. People U. S., V, 537-540, and documents cited.

the Cherokees were a "foreign State" within the meaning of the clause in the Judiciary Article of the Constitution above quoted,¹ and "praying an injunction to restrain the State of Georgia from the execution of the said laws of that State, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize for the use of Georgia the lands of the nation which have been assured to them by the United States by solemn treaties repeatedly made and still in force."

Mr. Kennedy, in his classic biography of Wirt,² appropriately gives the history of the Cherokee Case, which he declares he has endeavored (and we think successfully) to make impartial in the light which time has shed upon it. Georgia's policy, namely, that the welfare of the State as well as of the Indians required their removal west of the Mississippi, that the establishment of an Indian sovereignty within her limits could not be allowed, and the laches or failure of the General Government in keeping its covenant with Georgia, based upon a highly valuable consideration, to extinguish the Indian title, had done much to bring about the unfortunate and almost intolerable condition of things that existed in 1830. These are facts which are too often overlooked in our sympathy with the Indians and in our indignation at Georgia's defiance of the Supreme Court, but which Mr. Kennedy justly introduces into his relation of the Georgia-Cherokee controversy.

The truth is that the General Government had come under guaranties that conflicted with each other. It had promised Georgia to extinguish the Indian title. It had

¹ *Ante*, p. 655.

² *Life of William Wirt* by John P. Kennedy, 1851, II, chapter XV, 240-253, 320.

not done so. It had solemnly and repeatedly promised the Cherokees that it would protect them in and upon their reserved lands, and that they should never be disturbed in their rights, liberty or homes without their consent.

That the government in the course it pursued inverted the constitutional order and abdicated or disclaimed its own lawful paramount authority over the Indian tribes, and, contrary to the Constitution, mistakenly recognized the paramount authority of the State, was determined by the decisions of the Supreme Court in the Cherokee cases. These decisions have ever since been accepted as correct, and have been acted upon by the government from that time to the present in all of its legislation and dealings with the Indians.¹

In consequence of this erroneous view of its own powers, the government stood supinely by and allowed the State in the name of State Sovereignty to trample under foot the treaty obligations of the United States, to trespass upon and oppress the Indians, destroy their right to govern themselves, in short to deprive them of every substantial right guaranteed to them by numerous treaties which were still in force.

So far as concerns the policy of removal, sound statesmanship was on the side of Georgia; law, the public faith of the nation and treaty stipulations were on the

¹ "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection, as well as to the safety of those among whom they dwell. It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied [except in the case of Georgia], and because it alone can enforce its laws on all the tribes." Per Mr. Justice Miller in *United States v. Kagama*, 118 U. S. 375, 384 (1885).

side of the Cherokees. Mr. Wirt himself admitted in his letter to President Madison, October 5, 1830, that there are many in the United States who "think it the wisest course in the Indians to remove west of the Mississippi, and *I am among them.*"¹

Finally, a few years later (1838), under a new treaty, the Indians were removed. "Few persons," says Mr. Kennedy, "at the present day will lament the defeat of the Cherokees" in the Supreme Court of the United States. "It opened to the tribe a better destiny."²

¹ Kennedy, *Life of Wirt*, II, 261, where the correspondence between Wirt and Madison is given.

² Kennedy, *Life of Wirt*, II, 296. But the destiny or doom is destruction or absorption. An elaborate report made by a Committee of the Senate of the United States, May 7, 1894, states: "The Indian Territory contains an area of 19,785,781 acres, and is occupied by the five civilized tribes of Indians, consisting of the Cherokees, Creeks, Choctaws, Chickasaws and Seminoles, each occupying in general a separate and distinct part. The population in 1890 was as follows: Indians, 50,055; colored Indians and colored claimants to Indian citizenship, 18,636; Chinese, 13; whites, 109,393." Since 1890, the Committee stated, there had been a large accession of white population, who made no claim to Indian citizenship, and who were residing in the Indian Territory with the approval of the Indian authorities, numbering probably not less than 250,000 persons. In view of this large white population, the Committee say, it must be assumed in considering this question that the Indians themselves have determined to abandon the policy of exclusiveness and freely to admit white people within the Indian Territory. The Indians of the Indian Territory maintain an Indian government, with legislative bodies and executive and judicial officers. After a full review of the situation in the Indian Territory, the Committee expressed the view that there is no alternative left to the United States but to assume the responsibility for the future conditions of the Territory. See *Stephens v. Cherokee Nation*, 174 U. S. 445. Part of the Indian Territory is embraced in Oklahoma Territory, and all of it is destined before long to pass from Indian control.

The side of Georgia is concisely and forcibly presented by Col. Benton, one of the ablest supporters of the Jackson administration.¹ He maintains that "though called Indians, their primitive and equal government had lost its form, and had become an oligarchy, governed chiefly by a few white men called half-breeds. These set up governments within the States. It was the power of the whites, and of their children among the Cherokees, that destroyed the ancient laws, customs and authority of the tribe, and subjected the Nation to the rule of that most oppressive of governments—an oligarchy. It was this state of things that rendered it obligatory on Georgia to vindicate the rights of her sovereignty by abolishing all Cherokee government within its limits." Col. Benton concludes his account, after referring to the execution of Tassels pending an appeal to the Supreme Court of the United States: "The Cherokees afterwards made their treaty and removed in 1838 west of the Mississippi; and that was the end of the political and intrusive philanthropical interference with the domestic policy of Georgia. One Indian (Corn Tassels) hanged, some missionaries imprisoned, the Indians removed, and the political and pseudo-philanthropic intermeddlers left to the reflection of having done much mischief in assuming to become the defenders and guardians of a race which the humanity of our laws and people were treating with paternal kindness." Benton also gives an account of the treaty of 1835-36, by which the Cherokees ceded all their possessions east of the Mississippi and agreed, for an ample consideration, to join their brethren west of that river, to their advan-

¹ "Thirty Years' View," I, ch. li, p. 163, entitled "Indian Sovereignties within the States."

tage, but with the result of "extending the area of slavery in Georgia by converting Indian soil into slave soil," which the author credits to "the just and fraternal spirit in which the free States then acted towards their brethren of the south."¹

The foregoing sketch of the Cherokee controversy will enable the reader to understand the transcendent importance of the cases and of the decisions of the Supreme Court therein pronounced by Chief Justice Marshall.

The Cherokee Nation in the first case, and Worcester in the second, were represented by eminent counsel—William Wirt and John Sergeant. The State of Georgia did not enter an appearance in either case and was not represented by counsel. She stood aloof "upon her reserved rights," and was not present and purposely refrained from recognizing the cases in the Supreme Court, because she denied its right to be the arbiter of the controversy between her and the Cherokees, and also because she did not intend to be bound by its decision if adverse to the State.²

¹ "Thirty Years' View," I, 624-626; *Id.* 285. "To General Jackson's policy of removal of the Indians west of the Mississippi, praise little qualified can be justly awarded." Parton, *Life of Andrew Jackson*, III, 279.

² Kennedy, *Life of Wirt*, II, 291. "There was a sullen and ominous silence on the part of the State." *Id.*

Mr. Sergeant's argument, made on March 5, 1831, is included in a volume of his "Select Speeches," (Philadelphia) 1832, and it justifies the editor's encomium (p. vii) that "abridged as it is, and divested of all of the ornaments of rhetoric, it will be read and admired as a fine specimen of argumentative eloquence." A delightful sketch of Mr. Sergeant will be found in "The Forum," by David Paul Brown, Vol. II, chapter X, 205.

Mr. Wirt made the closing argument, which Mr. Kennedy says

The opinion of Chief Justice Marshall in the case that first follows was given upon the motion of the complainant for a preliminary injunction in accordance with the prayer of the bill. This motion was denied on the ground that within the meaning of the Constitution the Cherokee tribe was not a "foreign State," and consequently the Supreme Court had no original jurisdiction of the case. A decision on this ground necessarily ended the cause.

The Cherokee Nation v. The State of Georgia.

January Term, 1881.

[5 Peters' Reports, 1-80.]

The proposition of law decided is thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

An Indian tribe, or nation, within the United States, is not a "foreign State" within the meaning of the second section of the third article of the Constitution, and cannot sue in the courts of the United States.

The opinion in this case was, as above stated, given in a suit *originally* brought in the Supreme Court by the Cherokee Nation, claiming to be a "foreign State" within the meaning of the Judiciary Article (III) of the

"was very carefully studied; it is one upon which the most eminent lawyer in the country might contentedly rest his fame." *Life of Wirt*, II, 290, 291. Mr. Kennedy gives the peroration. "Discriminating and judicious critics have declared this to be one of the ablest and most admirable speeches ever delivered by that accomplished orator and lawyer." *Van Santvoord, Lives of the Chief Justices*, 492.

Constitution, against the State of Georgia. The opinion declares the legal relations of the Indian tribes to the United States. The judgment of the court was against its jurisdiction of the cause. The opinion of the court¹ is as follows:

MARSHALL, Chief Justice. This bill is brought by the Cherokee Nation, praying an injunction to restrain the State of Georgia from the execution Opinion. of certain laws of that State, which, as is alleged, go directly to annihilate the Cherokees as a political society, and to seize, for the use of Georgia, the lands of the Nation, which have been assured to them by the United States in solemn treaties repeatedly made and still in force.

If courts were permitted to indulge their sympathies, a case better calculated to excite them can scarcely be imagined. A people once numerous, powerful, and truly independent, found by our ancestors in the quiet and uncontrolled possession of an ample domain, gradually sink-

¹ The court was constituted as follows:

JOHN MARSHALL, <i>Chief Justice</i> ,	
WILLIAM JOHNSON,	} <i>Associate Justices.</i>
GABRIEL DUVAL,	
JOSEPH STORY,	
SMITH THOMPSON,	
JOHN MCLEAN,	
HENRY BALDWIN,	

William Wirt and John Sergeant appeared for complainants.

No counsel appeared for the State of Georgia.

Mr. Justice Baldwin concurred in the opinion of the court in dismissing the bill, but not for the reasons assigned. His view was that the questions involved were political and not judicial.

Mr. Justice Story and Mr. Justice Thompson dissented, they holding that the court had jurisdiction.

ing beneath our superior policy, our arts, and our arms, have yielded their lands by successive treaties, each of which contains a solemn guarantee of the residue, until they retain no more of their formerly extensive territory than is deemed necessary to their comfortable subsistence. To preserve this remnant the present application is made.

Before we can look into the merits of the case a preliminary inquiry presents itself: Has this court jurisdiction? Has this court jurisdiction of the cause?

The third article of the Constitution describes the extent of the judicial power. The second section closes an enumeration of the cases to which it is extended, with "controversies" "between a State, or the citizens thereof, and foreign States, citizens, or subjects." A subsequent clause of the same section gives the Supreme Court original jurisdiction in all cases in which a State shall be a party. The party defendant may, then, unquestionably, be sued in this court. May the plaintiff sue in it? Is the Cherokee Nation a foreign State in the sense in which that term is used in the Constitution?

Plaintiffs contend that the Cherokee Nation is a foreign State under the Constitution. The counsel for the plaintiffs have maintained the affirmative of this proposition with great earnestness and ability. So much of the argument as was intended to prove the character of the Cherokees as a State, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of the majority of the judges, been completely successful. They have been uniformly treated as a State from the settlement of our country. The numerous treaties made with them by the United States recognize

them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee Nation as a State, and the courts are bound by those acts.

They are a State in the sense of being a distinct political body.

A question of much more difficulty remains: Do the Cherokees constitute a foreign State in the sense of the Constitution?

Are they a foreign State under the Constitution?

The counsel have shown conclusively that they are not a State of the Union, and have insisted that, individually, they are aliens, not owing allegiance to the United States. An aggregate of aliens composing a State must, they say, be a foreign State. Each individual being foreign, the whole must be foreign.

Counsel for plaintiffs contend that they are aliens, and therefore a foreign State.

This argument is imposing, but we must examine it more closely before we yield to it. The condition of the Indians in relation to the United States is, perhaps, unlike that of any other two people in existence. In the general, nations not owing a common allegiance are foreign to each other. The term "foreign nation" is, with strict propriety, applicable by either to the other. But the relation of the Indians to the United States is marked by peculiar and cardinal distinctions which exist nowhere else.

The condition of the Indians in relation to the United States is unique.

The Indian Territory is admitted to compose a part of the United States. In all our maps, geographical treatises, histories and laws, it is so considered. In all our

intercourse with foreign nations, in our commercial regulations, in any attempt at intercourse between Indians and foreign nations, they are considered as within the jurisdictional limits of the United States, subject to many of those restraints which are imposed upon our own citizens. They acknowledge themselves in their treaties to be under the protection of the United States; they admit that the United States shall have the sole and exclusive right of regulating the trade with them, and managing all their affairs as they think proper; and the Cherokees, in particular, were allowed by the treaty of Hopewell, which preceded the Constitution, "to send a deputy of their choice, whenever they think fit, to Congress." Treaties were made with some tribes by the State of New York, under a then unsettled construction of the Confederation, by which they ceded all their lands to that State, taking back a limited grant to themselves, in which they admit their dependence.

Though the Indians are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government, yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

Indians are domestic
dependent nations.

They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants, and address the President as their great father. They and their country are considered by foreign nations, as well as by ourselves, as being so completely under the sovereignty and dominion of the United States that any attempt to acquire their lands, or to form a political connection with them, would be considered by all as an invasion of our territory, and an act of hostility.

These considerations go far to support the opinion that the framers of our Constitution had not the Indian tribes in view when they opened the courts of the Union to controversies between a State, or the citizens thereof, and foreign States.

In considering this subject, the habits and usages of the Indians, in their intercourse with their white neighbors, ought not to be entirely disregarded. At the time the Constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong had, perhaps, never entered the mind of an Indian or of his tribe. Their appeal was to the tomahawk, or to the government. This was well understood by the statesmen who framed the Constitution of the United States, and might furnish some reason for omitting to enumerate them among the parties who might sue in the courts of the Union. Be this as it may, the peculiar relations between the United States and the Indians occupying our territory are such that we should feel much difficulty in considering them as designated by the term "foreign State," were there no other part in the Constitution which might shed light on the meaning of these words. But we think that, in construing them,

Clause of Constitution
empowering Congress
to regulate commerce
with the Indian tribes.

considerable aid is furnished by that clause, in the eighth section of the third article, which empowers Congress to "regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

In this clause they are as clearly contradistinguished, by a name appropriate to themselves, from foreign nations, as from the several States composing the Union. They are designated by a distinct appellation; and as this appellation can be applied to neither of the others, neither can the appellation distinguishing either of the others be, in fair construction, applied to them. The objects to which the power of regulating commerce might be directed are divided into three distinct classes,—foreign nations, the several States, and Indian tribes. When forming this article the convention considered them as entirely distinct. We cannot assume that the distinction was lost in framing a subsequent article, unless there be something in its language to authorize the assumption.

The counsel for the plaintiffs contend that the words "Indian tribes" were introduced into the article empowering Congress to regulate commerce, for the purpose of removing those doubts in which the management of Indian affairs was involved by the language of the ninth article of the Confederation. Intending to give the whole power of managing those affairs to the government about to be instituted, the convention conferred it explicitly; and omitted those qualifications which embarrassed the exercise of it as granted in the Confederation. This may be admitted without weakening the construction which has been intimated. Had the Indian tribes been foreign nations in the view of the convention, this exclusive power of regulating intercourse with them

might have been, and, most probably, would have been, specifically given, in language indicating that idea, not in language contradistinguishing them from foreign nations. Congress might have been empowered "to regulate commerce with foreign nations, including the Indian tribes, and among the several States." This language would have suggested itself to statesmen who considered the Indian tribes as foreign nations, and were yet desirous of mentioning them particularly.¹

If Indians were considered a foreign nation what the language of the clause would have been.

It has been also said that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true. In common language the same word has various meanings, and the peculiar sense in which it is used in any sentence is to be determined by the context. This may not be equally true with respect to proper names. "Foreign nations" is a general term, the application of which to Indian tribes, when used in the American Constitution, is, at best, extremely questionable. In one article, in which a power is given to be exercised in regard to foreign nations generally, and to the Indian tribes particularly, they are mentioned as separate in terms clearly contradistinguishing them from each other. We perceive plainly that the Constitution in this article does not comprehend Indian tribes in the general term "foreign nations," not, we presume, because a tribe may not be a nation, but because it is not foreign to the United States. When, afterwards, the term "foreign State" is introduced, we cannot impute to

Construction.

¹ Story, Com., I, ch. 5, § 454.

the convention the intention to desert its former meaning, and to comprehend Indian tribes within it, unless the context force that construction on us. We find nothing in the context, and nothing in the subject of the article, which leads to it.

The court has bestowed its best attention on this question, and, after mature deliberation, the majority is of opinion that an Indian tribe or nation within the United States is not a foreign State in the sense of the Constitution, and cannot maintain an action in the courts of the United States.

A serious additional objection exists to the jurisdiction of the court. Is the matter of the bill the proper subject for judicial inquiry and decision? It seeks to restrain a State from the forcible exercise of legislative power over a neighboring people asserting their independence; their right to which the State denies. On several of the matters alleged in the bill, for example, on the laws making it criminal to exercise the usual powers of self-government in their own country by the Cherokee Nation, this court cannot interpose; at least in the form in which those matters are presented.

That part of the bill which respects the land occupied by the Indians, and prays the aid of the court to protect their possession, may be more doubtful. The mere question of right might, perhaps, be decided by this court in a proper case with proper parties. But the court is asked to do more than decide on the title. The bill requires us to control the Legislature of Georgia, and to restrain the exertion of its physical force. The propriety of such an interposition by the court may be well questioned. It savors too much of the exercise of political power to be

within the proper province of the judicial department. But the opinion on the point respecting parties makes it unnecessary to decide this question.

If it be true that the Cherokee Nation have rights, this is not the tribunal in which those rights are to be asserted. If it be true that wrongs have been inflicted, and that still greater are to be apprehended, this is not the tribunal which can redress the past or prevent the future.

The motion for an injunction is denied.

NOTE

The great and permanent value of the foregoing opinion and of the next is that they defined and established the fundamental relations of the General Government and of the States to the Indian tribes. With this subject Mr. Justice Miller was specially conversant; and in treating of it he says: "The relations of the Indian tribes to the States and to the Federal Government have often been before the Supreme Court of the United States, whose judgments have largely influenced the course of legislation by Congress, as well as the States, in regard to those tribes. The first case involving those relations was that of the Cherokee Nation *v.* Georgia, in which the court, considering the general subject, held that these tribes, although occupying a semi-independent position, which enabled them to make treaties with the United States, were neither States of the Union nor foreign States, in the sense of the Constitution, which confers jurisdiction upon the Supreme Court in controversies between a State or the citizens thereof and foreign States, citizens or subjects. It declared that these tribes were, owing to their peculiar conditions, wards and pupils of the nation, and largely under its control.

"In the succeeding case of *Worcester v. Georgia*, 6 Pet. 515, the same proposition is advanced, and it was held that they were independent of the laws and government of the State within which they might as a tribe be located. . . .

"This principle seems to have settled the independence of those tribes of State legislation and State jurisdiction

generally, but it afterwards came to be questioned what power the government of the United States or Congress could exercise over such Indians. This matter came up in *United States v. Kagama*, 118 U. S. 375 (1885). The whole subject there was fully reviewed, and the proposition finally established that 'while the government of the United States has recognized in the Indian tribes heretofore a state of semi-independence and pupilage, it has the right and authority, instead of controlling them by treaties, to govern them by acts of Congress; they being within the geographical limit of the United States and being necessarily subject to the laws which Congress may enact for their protection and for the protection of the people with whom they come in contact. The States have no such power over them as long as they maintain their tribal relations.' This settled a difficult and vexatious question, and one very important to the Indians themselves as well as to the citizens of the United States who are brought in contact with them." *Miller, Const. of U. S.* 401, 402, 403.

The Indian tribes have always been recognized as distinct communities, and have been permitted to a large extent to make and enforce the laws for their own government; but they are in no sense sovereign nations, and are, like all other communities within the territory of the United States, subject to the paramount authority of Congress, which may, in its discretion, assume such part of the government and control of any tribe as, in its judgment, is necessary or for the best interest of the members. *Stephens v. Cherokee Nation*, 174 U. S. 445, 488 (1898); *United States v. Rogers*, 4 Howard, 567, 572; *United States v. Kagama*, 118 U. S. 375, 379; *Choctaw Nation v. United States*, 119 U. S. 1, 27. See also *Kent, Com.*, I, 297, note *d*, III, 381; *Story, Com. on Const.*, I, ch. 5, § 454; *Von Holst, Const. Hist. of U. S.*, I, 452 *et seq.*; *Carson, Hist. Sup. Court*, 267, 269, 642.

In *Elk v. Wilkins*, 112 U. S. 94 (1884), the Supreme Court of the United States held that an Indian born a member of one of the Indian tribes within the United States is not merely by reason of his birth, and of his afterwards voluntarily separating himself from his tribe and taking up his residence among white citizens, a citizen of the United States within the meaning of the

Fourteenth Amendment, which provides that all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. It was accordingly held by the court that an Indian plaintiff could not maintain an action against the defendant registrar for refusing to register him as a qualified voter. Further as to the legal status of tribal Indians, see Thayer, Cases on Constitutional Law, Parts I, II, pages 583-599, and notes.

The power of the court to restrain a State from the exertion of physical force in the execution of an unconstitutional State law is referred to but was left undecided in *Cherokee Nation v. Georgia*. That the court cannot or will not exercise such a power, see *Mississippi v. Johnson*, 4 Wallace, 475 (1866); Marshall Memorial, I, pp. 1, li (Introduction); Carson, History Supreme Court, 629. "The distinction between judicial and political power is so generally acknowledged in the jurisprudence both of England and of this country, that we need do no more than refer to some of the authorities on the subject," citing, *inter alia*, *Cherokee Nation v. Georgia*. Miller on Const. of U. S. 314, note; Carson, Hist. Supreme Court, 629; Langdon, Const. Hist. Supreme Court, 278, 279.

REFERENCES TO CHEROKEE NATION *v.* GEORGIA, IN MARSHALL MEMORIAL

Judge Wm. A. Ketcham, II, p. 294.

In the *Cherokee Nation* against Georgia, Marshall held that the Indians were not a foreign nation, and therefore not entitled to sue in the Supreme Court; and then, with his wonted felicity of phrase, he described them as a "domestic and dependent" nation dwelling within the boundaries of the United States and subject only to the laws and treaties of the central government — a proposition capable of wide application, and carrying with it possibilities of a great extension of the National authority. Following out this principle in the case of *Worcester* against Georgia, he held that a citizen of the United States going into the Cherokee country could not be held amenable to the laws of Georgia. The administration was out of

sympathy with Marshall's views, the State of Georgia was openly defiant, yet after some months of delay the State gave way, the missionaries were released, and the court triumphed. *Hon. Henry Cabot Lodge, II, 381.*

ADDITIONAL NOTE: The court triumphed not immediately and directly but in the long run by the general acceptance of its doctrines. Georgia, says Kennedy,¹ "paid no respect to the decision of the Supreme Court. The judgment was treated as a nullity, and the missionaries were still retained in the penitentiary, until the Governor of Georgia thought proper to release them. The President of the United States gave but little hope of the favorable interference of the government. The Governor of Georgia is said to have declared that he would rather hang the missionaries than liberate them under the mandate of the Supreme Court. Nothing was left for the prisoners but to wait for a day of cooler judgment and more moderate counsels. After some eighteen months this day arrived. The contest had grown hopeless to the weaker party. The missionaries were released; and here ended this extraordinary chapter in the history of our free government."²

The immediate and direct effect, therefore, can scarcely be called a triumph for the Supreme Court. But this was probably owing to the well understood position of the President that he would not interfere. His reported saying has become famous: "Mr. Marshall has made the decision, now let him execute it."³

It will be noticed that the judgment of the Supreme Court was that the Georgia law under which Worcester was convicted was unconstitutional and void, and the judgment of the State court was accordingly "reversed

¹ *Life of Wirt, II, 323.*

² The release was not in obedience to the judgment of the Supreme Court, but by the action of the Governor upon the application of the missionaries to the pardoning power of the State. Benton, "Thirty Years' View," I, 285.

³ Carson, *History Supreme Court*, 269. It may, perhaps, be doubted whether Corn Tassels, on his way to the gallows, or Worcester, lying in prison for eighteen months after the decision of the Supreme Court, realized that the Supreme Court was the victorious, and Georgia the defeated, party.

and annulled" by the Supreme Court.¹ If the State court refused to recognize and obey the judgment of the Supreme Court and to release the prisoner, a remedy could, on his application, have been had by *mandamus* or *habeas corpus* issued by the proper Federal tribunal, and, if the execution of its judgment was resisted by the State authorities, the President of the United States, on due application to him, would be under the constitutional duty to "take care that the laws be faithfully executed." In such a case the President would, we think, have no right to say that he took an oath only to obey the Constitution *as he understood it*.² So far as we are advised, no formal or official application to the President by the Federal court to enforce the release of Worcester from prison was presented or denied, and the President's remark above mentioned, though very characteristic, was, if made at all, merely a *dictum*.³

¹ See text of judgment, 6 Peters, 596, 597.

² See *ante*, p. 472.

³ The Legislature of Georgia had by resolution "authorized and required the Governor with all the force at his command to resist and repel any and every invasion, from whatever quarter, upon the administration of the criminal laws of this State," and "how far he should risk armed collision by the United States in the State of Georgia in enforcing judgment was," in the opinion of Langdon, "a prudential question, in respect to which it was his right and duty to exercise his own judgment." Langdon, Const. Hist. U. S. 285. See *Ableman v. Booth*, 21 How. 506, where in 1855, in a case where Booth was indicted and convicted in the United States court for Wisconsin, for aiding in the escape of a fugitive slave from the United States marshal and was discharged on *habeas corpus* by the State courts, the State authorities of Wisconsin, following the precedent in the Georgia case, practically nullified the decision of the Supreme Court of the United States reversing the decision of the Supreme Court of the State affirming the release of Booth on *habeas corpus*. "The action of the Wisconsin court," says Langdon, "practically and successfully nullified the authority of the United States Supreme Court, and was just as revolutionary as the similar action in the Georgia case. In both cases popular opinion defied the supreme law." Langdon, Const. Hist. U. S. 286, 287. See *Commonwealth v. Dennison*, 24 How. 66; *Merryman's Case* and action of Chief Justice Taney therein, Taney's Circuit Court Decisions, 246 (1861); Marshall Memorial, Introduction, I, p. li, note; Carson, Hist. Sup. Ct. 375-378.

**THE NATIONAL AUTHORITY OVER INDIAN
TRIBES AS AGAINST THE STATES IS SU-
PREME AND EXCLUSIVE.**

The general history and result of the next case — *Worcester v. Georgia* — are given in connection with the case of the *Cherokee Nation v. Georgia*,¹ to which the reader is referred. Worcester's case was heard in the Supreme Court the next year after the preceding case was decided. It was argued in behalf of Worcester by Mr. Wirt and Mr. Sergeant; the State was not represented by counsel.²

The following opinion of Chief Justice Marshall, written in his seventy-seventh year, is one of his most elaborate judgments, occupying over eighty pages in Peters' Reports. Mr. Justice Story's correspondence has preserved some interesting data and reminiscences concern-

¹ *Ante*, p. 655.

² *Ante*, p. 665.

Mr. Justice Story thus writes to his wife under date, Washington, February 26, 1832, concerning the arguments in this case and the case itself: "We have had from Mr. Wirt and Mr. Sergeant, in the past week, some fine arguments in the Cherokee case, brought before us in a new form. Both of the speeches were very able, and Mr. Wirt's in particular was uncommonly eloquent, forcible and finished. They were on the side of the missionaries, and no person appeared for the State of Georgia. I confess that I blush for my country when I perceive that such legislation, destructive of all faith and honor towards the Indians, is suffered to pass with the silent approbation of the present government of the United States." *Story, Life and Letters*, II, 84. In a previous letter, January 13, 1832, to Mrs. Story, he uttered the same sentiments: "I never in my whole life was more affected by the consideration that they and all their race are destined to destruction. And I feel, as an American, disgraced by our gross violation of the public faith towards them." *Id.* 79.

ing it, states his estimate of it, the manner in which it was received, his emphatic disapproval of the failure of the United States to keep faith with the Cherokees, and his satisfaction with the reflection that the court had done its whole duty.¹

Referring to this decision of the court, the manner in which it was received, and its probable effect, Justice Story wrote to Professor Ticknor, March 8, 1832: "The decision produced a very strong sensation in both Houses; Georgia is full of anger and violence. Probably she will resist the execution of our judgment, and if she does, I do not believe the President will interfere, unless public opinion among the religious of the Eastern, Western

¹ Concerning the opinion of the Chief Justice in this case we have the following contemporary estimate by Mr. Justice Story, who, in a letter to his wife, March 4, 1832, says: "Yesterday morning the Chief Justice delivered the opinion of the court in the Cherokee Case in favor of the missionaries. It was a very able opinion, in his best manner. Thanks be to God, the court can wash their hands clean of the iniquity of oppressing the Indians and disregarding their rights." Story, *Life and Letters*, II, 87.

In the same letter Story gives this affecting picture of the Chief Justice on the day following the delivery of this opinion: "On going into the Chief Justice's room this morning I found him in tears over the memory of his own wife, and he has said to me several times during the term that the moment he relaxes from business he feels exceedingly depressed, and rarely goes through a night without weeping over his departed wife. She must have been a very extraordinary woman so to have attached him, and I think he is the most extraordinary man I ever saw for the depth and tenderness of his feelings." Such an experience is not singular. Many another has sought to drown an ever-emerging sorrow in the wide, deep, benign ocean of work. We trust the reader will not regard this touch of nature, this idyllic picture of the great and venerated Chief Justice as wholly intrusive, or if so will pardon it because of its relation in Story's letter to the opinion of the Chief Justice in the present case.

and Middle States should be brought to bear strong upon him. The rumor is, that he has told the Georgians he will do nothing. I, for one, feel quite easy on the subject, be the event what it may. The court has done its duty. Let the nation now do theirs. If we have a Government, let its command be obeyed; if we have not, it is as well to know it at once, and look to consequences."¹

An explosion and fire which occurred in 1898 in the Capitol at Washington unfortunately destroyed many of the archives of the Supreme Court, including most of the manuscript opinions of Chief Justice Marshall. The original opinions in *Marbury's* case, the great New York

¹ Story, *Life and Letters*, II, 83. Miss Martineau was present early in 1835 when an opinion of Chief Justice Marshall was read, and it was the occasion of her impressive description in which she refers to the homage paid to him by his associates, and introduces Webster, Clay, Attorney-General Butler, dark Cherokee chiefs, members of either House, ladies in waving plumes, etc., constituting "one silent assemblage, while the mild voice of the aged Chief Justice sounded through the court." *Retrospect of Western Travel*, I, 165, English Ed., I, 275; Van Santvoord, p. 432, note; Story, *Life and Letters*, II, 191.

On February 14, 1835, Story wrote to Miss Martineau: "The Chief Justice purely of his own suggestion wrote the letter which accompanies this. He could give you no better proof of how highly he esteems you. When I tell you that he is one of the greatest minds America has produced, and is equally distinguished for his purity, his sterling integrity, his patriotism, his warm affections, his benevolence, and his undying veneration and enthusiasm for your sex, you will not fail to appreciate my feelings in regard to this compliment to you. Pray keep his letter; it is a memorial of a man of eighty, still in the possession of his glorious mind, and whose death whenever it may happen will cause a sensation in America, unequalled except by that of Washington." Story, *Life and Letters*, II, 191. Keep the letter Miss Martineau did, and when she published her autobiography thirty-five years later she included it as a souvenir of "the majestic old Judge, the most venerated man in the country." *Autobiography*, I, 395 (Am. Ed. 1879).

Steamboat case, the Maryland Bank case, etc., no longer exist. Mr. McKenney, Clerk of the Supreme Court, obligingly made a thorough examination to ascertain whether any of Marshall's famous opinions in his own hand were extant. He found that there was still in existence a volume which had belonged to Mr. Peters, the reporter, entitled "Original Opinions of the Justices of the Supreme Court, January Term, 1832," comprising the opinions of that term, some in MSS. and some in proof-sheets, and there were in several instances, bound up with the opinions, personal or unofficial notes or letters from the Judges to the Reporter. This volume contains in full the opinion of Chief Justice Marshall in his own handwriting in the case of *Worcester v. Georgia*, and there is inserted a most interesting letter from the Chief Justice to Mr. Peters, dated Richmond, March 23, 1832. This letter and the last page of the opinion in *Worcester v. Georgia* were photographed and facsimiles thereof are included in the present work.¹

Worcester v. The State of Georgia.

January Term, 1832.

[6 Peters' Reports, 515-597.]

The propositions of law decided are thus stated by Mr. Justice Curtis in his edition of *Decisions of the Supreme Court of the United States*:

A return to a writ of error from this court to a State court, certified by the clerk of the court which pronounced the judgment, and to which the writ is addressed, and authenticated by the seal of the court,

¹ For these the editor and publishers are indebted to Judge Dillon, at whose instance the examination above mentioned was made and the facsimiles produced.

is in conformity to law, and brings the record regularly before this court.

The relations between the Indian tribes and the United States examined.

The law of Georgia, which subjected to punishment all white persons residing within the limits of the Cherokee Nation, and authorized their arrest within those limits, and their forcible removal therefrom, and their trial in a court of the State, was repugnant to the Constitution, treaties, and laws of the United States, and so void; and a judgment against the plaintiff in error, under color of that law, was reversed by this court, under the twenty-fifth section of the Judiciary Act.

The State of Georgia having carried into execution the laws of the State, which the foregoing suit sought unsuccessfully to restrain, by the indictment and conviction of a missionary by the name of Worcester, the validity of such conviction was brought under review in the following famous case. The Chief Justice, who delivered the opinion of the court,¹ has given every fact

¹ The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

WILLIAM JOHNSON,

JOSEPH STORY,

GABRIEL DUVALL,

SMITH THOMPSON,

JOHN MCLEAN,

HENRY BALDWIN,

} *Associate Justices.*

Justice Johnson was absent on account of ill health during this term.

Justice Baldwin dissented.

Justice McLean, while not dissenting, delivered a separate opinion in this case.

Mr. John Sergeant, Mr. William Wirt and Mr. Elisha W. Chester appeared for the plaintiffs in error.

and document necessary to a full comprehension of the case:

MARSHALL, Chief Justice. This cause, in every point of view in which it can be placed, is of the deepest interest.

Opinion.

The defendant is a State, a member of the Union, which has exercised the powers of government over a people who deny its jurisdiction, and are under the protection of the United States.

The plaintiff is a citizen of the State of Vermont, condemned to hard labor for four years in the penitentiary of Georgia, under color of an act which he alleges to be repugnant to the Constitution, laws, and treaties of the United States.

The legislative power of a State, the controlling power of the Constitution and laws of the United States, the rights, if they have any, the political existence of a once numerous and powerful people, the personal liberty of a citizen, are all involved in the subject now to be considered.

It behooves this court, in every case, more especially in this, to examine into its jurisdiction with scrutinizing eyes, before it proceeds to the exercise of a power which is controverted.

The first step in the performance of this duty is the inquiry, whether the record is properly before the court.

It is certified by the clerk of the court which pronounced the judgment of condemnation under which the plaintiff in error is imprisoned; and is also authenticated by the seal of the court. It is returned with, and annexed to, a writ of error issued in regular form, the citation being signed by one of the Associate Justices of the Supreme court, and

*Is the record properly
before the court.*

served on the Governor and Attorney-General of the State more than thirty days before the commencement of the term to which the writ of error was returnable.

The Judicial Act (sections 22, 25, 2 Laws United States 64, 65), so far as it prescribes the mode of proceeding, appears to have been literally pursued.

In February, 1797, a rule (6 Wheaton's Rules) was made on this subject in the following words: "It is ordered by the court that the clerk of the court, to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the same, under his hand and the seal of the court."

This has been done. But the signature of the judge has not been added to that of the clerk. The law does not require it. The rule does not require it.

In the case of *Martin v. Hunter's Lessee* (1 Wheaton's Reports, 304, 361), an exception was taken to the ^{idem.} return of the refusal of the State court to enter a prior judgment of reversal by this court, because it was not made by the judge of the State court to which the writ was directed; but the exception was overruled, and the return was held sufficient. In *Buel v. Van Ness* (8 Wheaton's Reports, 312), also a writ of error to a State court, the record was authenticated in the same manner. No exception was taken to it. These were civil cases. But it has been truly said at the bar that, in regard to this process, the law makes no distinction between a criminal and civil case. The same return is required in both. If the sanction of the court could be necessary for the establishment of this position, it has been silently given.

M'Culloch v. The State of Maryland (4 Wheaton's Re-

ports, 316) was a *qui tam* action brought to recover a penalty, and the record was authenticated by the seal of the court and the signature of the clerk, without that of a judge. *Brown et al. v. The State of Maryland* was an indictment for a fine and forfeiture. The record in this case, too, was authenticated by the seal of the court and the certificate of the clerk. The practice is both ways.

The record, then, according to the Judiciary Act, and the rule and the practice of the court, is regularly before us. The more important inquiry is, Does it exhibit a case cognizable by this tribunal?

Record is regularly before the court.

The indictment charges the plaintiff in error and others, being white persons, with the offense of "residing within the limits of the Cherokee Nation without a license," and "without having taken the oath to support and defend the Constitution and laws of the State of Georgia."

The indictment.

The defendant in the State court appeared in proper person, and filed the following plea:

"And the said Samuel A. Worcester, in his own proper person, comes and says that this court ought not to take further cognizance

Plea filed by defendant in State court.

of the action and prosecution aforesaid, because, he says, that on the 15th day of July, in the year 1831, he was, and still is, a resident in the Cherokee Nation; and that the said supposed crime or crimes, and each of them, were committed, if committed at all, at the town of New Echota, in the said Cherokee Nation, out of the jurisdiction of this court, and not in the county of Gwinnet, or elsewhere, within the jurisdiction of this court. And this defendant saith that he is a citizen of the State of Vermont, one of the United States of America, and that

he entered the aforesaid Cherokee Nation in the capacity of a duly authorized missionary of the American Board of Commissioners for Foreign Missions under the authority of the President of the United States, and has not since been required by him to leave it; that he was, at the time of his arrest, engaged in preaching the gospel to the Cherokee Indians, and in translating the Sacred Scriptures into their language, with the permission and approval of the said Cherokee Nation, and in accordance with the humane policy of the Government of the United States, for the civilization and improvement of the Indians; and that his residence there, for this purpose, is the residence charged in the aforesaid indictment.

Idem. And this defendant further saith that this prosecution the State of Georgia ought not to have or maintain, because he saith that several treaties have, from time to time, been entered into between the United States and the Cherokee Nation of Indians, to wit, at Hopewell, on the 28th day of November, 1785; at Holston, on the 2d day of July, 1791; at Philadelphia, on the 26th day of June, 1794; at Tellico, on the 2d day of October, 1798; at Tellico, on the 24th day of October, 1804; at Tellico, on the 25th day of October, 1805; at Tellico, on the 27th day of October, 1805; at Washington City, on the 7th day of January, 1806; at Washington City, on the 22d day of March, 1816; at the Chickasaw Council House, on the 14th day of September, 1816; at the Cherokee Agency, on the 8th day of July, 1817; and at Washington City, on the 27th day of February, 1819; all which treaties have been duly ratified by the Senate of the United States of America; and by which treaties the United States of America acknowledge the said Cherokee Nation to be a sovereign Nation, authorized to govern themselves.

and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America, in reference to acts done within their own territory; and by which treaties the whole of the territory now occupied by the Cherokee Nation, on the east of the Mississippi, has been solemnly guarantied to them; all of which treaties are existing treaties at this day, and in full force. By these treaties, and particularly by the treaties of Hopewell and Holston, the aforesaid territory is acknowledged to lie without the jurisdiction of the several States composing the Union of the United States; ^{Idem.} and it is thereby specially stipulated that the citizens of the United States shall not enter the aforesaid territory, even on a visit, without a passport from the Governor of a State, or from some one duly authorized thereto by the President of the United States; all of which will more fully and at large appear by reference to the aforesaid treaties. And this defendant saith that the several acts charged in the bill of indictment were done, or omitted to be done, if at all, within the said territory so recognized as belonging to the said Nation, and so, as aforesaid, held by them under the guaranty of the United States; that for those acts the defendant is not amenable to the laws of Georgia, nor to the jurisdiction of the courts of the said State; and that the laws of the State of Georgia, which profess to add the said territory to the several adjacent counties of the said State, and to extend the laws of Georgia over the said territory and persons inhabiting the same, and, in particular, the act on which this indictment against this defendant is grounded, to wit, an act entitled 'An act to prevent the exercise of assumed and arbitrary power, by all persons, under pretext of au-

thority from the Cherokee Indians, and their laws, and to prevent white persons from residing within that part of the chartered limits of Georgia occupied by the Cherokee Indians, and to provide a guard for the protection of the gold mines, and to enforce the laws of the State within the aforesaid territory,' are repugnant to the aforesaid treaties, which, according to the Constitution of the United States, compose a part of the supreme law of the land; and that these laws of Georgia are, therefore, unconstitutional, void, and of no effect; that the said laws of Georgia are also unconstitutional and void because they impair the obligation of the various contracts formed by and between the aforesaid Cherokee Nation and the said United States of America as above recited; also that the said laws of Georgia are unconstitutional and void because they interfere with and attempt to regulate and control the intercourse with the said Cherokee Nation, which, by the said Constitution, belongs exclusively to the Congress of the United States; and because the said laws are repugnant to the statute of the United States, passed on the ——— day of March, 1802, entitled 'An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers;' and that, therefore, this court has no jurisdiction to cause this defendant to make further or other answer to the said bill of indictment, or further to try and punish this defendant for the said supposed offense or offenses alleged in the bill of indictment, or any of them; and, therefore, this defendant prays judgment whether he shall be held bound to answer further to said indictment."

Plea overruled. This plea was overruled by the court. And the prisoner, being arraigned, plead not guilty. The jury found a verdict against him, and the

court sentenced him to hard labor, in the penitentiary, for the term of four years.

By overruling this plea the court decided that the matter it contained was not a bar to the action. The plea, therefore, must be examined, for the purpose of determining whether it makes a case which brings the party within the provisions of the twenty-fifth section of the "Act to establish the judicial courts of the United States."

The plea avers that the residence charged in the indictment was under the authority of the President of the United States, and with Plea examined. the permission and approval of the Cherokee Nation; that the treaties subsisting between the United States and the Cherokees acknowledge their right, as a sovereign Nation, to govern themselves and all persons who have settled within their territory, free from any right of legislative interference by the several States composing the United States of America; that the act under which the prosecution was instituted is repugnant to the said treaties, and is, therefore, unconstitutional and void; that the said act is also unconstitutional because it interferes with, and attempts to regulate and control, the intercourse with the Cherokee Nation, which belongs exclusively to Congress; and because, also, it is repugnant to the statute of the United States entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers."

Let the averments of this plea be compared with the twenty-fifth section of the Judicial Act.

That section enumerates the cases in which the final judgment or decree of a State court Sec. 25 of Judicial Act. may be revised in the Supreme Court of the United States. These are, "where is drawn in

question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said Constitution, treaty, statute, or commission."

The indictment and plea in this case draw in question, we think, the validity of the treaties made by the United States with the Cherokee Indians; if not so, their construction is certainly drawn in question; and the decision has been, if not against their validity, "against the right, privilege, or exemption, specially set up and claimed under them." They also draw into question the validity of a statute of the State of Georgia, "on the ground of its being repugnant to the Constitution, treaties, and laws of the United States, and the decision is in favor of its validity."

It is, then, we think, too clear for controversy, that the act of Congress by which this court is constituted has given it the power, and of course imposed on it the duty, of exercising jurisdiction in this case. This duty, however unpleasant, cannot be avoided. Those who fill the judicial department have no discretion in selecting the sub-

Indictment and plea draw in question validity and construction of treaties by United States with Cherokee Indians.

Act of Congress has given this court jurisdiction in this case.

jects to be brought before them. We must examine the defense set up in this plea. We must inquire and decide whether the act of the Legislature of Georgia, under which the plaintiff in error has been prosecuted and condemned, be consistent with, or repugnant to, the Constitution, laws, and treaties of the United States.

It has been said at the bar that the acts of the Legislature of Georgia seize on the whole Cherokee country, parcel it out among the neighboring counties of the State, extend her code over the whole country, abolish its institutions and its laws, and annihilate its political existence.

If this be the general effect of the system, let us inquire into the effect of the particular statute and section on which the indictment is founded.

It enacts that "all white persons, residing within the limits of the Cherokee Nation on the

1st day of March next, or at any time Statute on which indictment was found. thereafter, without a license or permit

from his excellency the Governor, or from such agent as his excellency the Governor shall authorize to grant such permit or license, and who shall not have taken the oath hereinafter required, shall be guilty of a high misdemeanor, and, upon conviction thereof, shall be punished by confinement to the penitentiary at hard labor, for a term not less than four years."

The eleventh section authorizes the Governor, should he deem it necessary for the protection of the mines, or the enforcement of the laws in Eleventh section. force within the Cherokee Nation, to raise and organize a guard, etc.

The thirteenth section enacts "that the said guard, or any member of them, shall be, and they are hereby,

authorized and empowered to arrest any person legally charged with, or detected in, a violation of the laws of this State, and to convey, as soon as practicable, the person so arrested before a justice of the peace, judge of the superior, or justice of an inferior court of this State, to be dealt with according to law."

Thirteenth section.

The extra-territorial power of every Legislature being limited in its action to its own citizens or subjects, the very passage of this act is an assertion of jurisdiction over the Cherokee Nation, and of the rights and powers consequent on jurisdiction.

Passage of the act is of itself an assertion of jurisdiction over the Cherokees.

The first step, then, in the inquiry, which the Constitution and laws impose on this court, is an examination of the rightfulness of this claim.

First step is the examination of the rightfulness of this claim.

America, separated from Europe by a wide ocean, was inhabited by a distinct people, divided into separate nations, independent of each other and of the rest of the world, having institutions of their own, and governing themselves by their own laws. It is difficult to comprehend the proposition that the inhabitants of either quarter of the globe could have rightful original claims of dominion over the inhabitants of the other, or over the lands they occupied; or that the discovery of either by the other should give the discoverer rights in the country discovered, which annulled the pre-existing rights of its ancient possessors.

Historical review necessary properly to examine this claim of jurisdiction over Indians.

After lying concealed for a series of ages, the enterprise of Europe, guided by nautical science, conducted some of her adventurous sons into this western world.

They found it in possession of a people who had made small progress in agriculture or manufactures, and whose general employment was war, hunting and fishing.

Did these adventurers, by sailing along the coast, and occasionally landing on it, acquire for the several governments to whom they belonged, or by whom they were commissioned, a rightful property in the soil, from the Atlantic to the Pacific; or rightful dominion over the numerous people who occupied it? Or has nature, or the great Creator of all things, conferred these rights over hunters and fishermen, on agriculturists and manufacturers?

But power, war, conquest, give rights which, after possession, are conceded by the world; and which can never be controverted by those on whom they descend. We proceed, then, to the actual state of things, having glanced at their origin; because holding it in our recollection might shed some light on existing pretensions.

Power, war, conquest, give rights, conceded by the world.

The great maritime powers of Europe discovered and visited different parts of this continent at nearly the same time. The object was too immense for any one of them to grasp the whole; and the claimants were too powerful to submit to the exclusive or unreasonable pretensions of any single potentate. To avoid bloody conflicts, which might terminate disastrously to all, it was necessary for the nations of Europe to establish some principle which all would acknowledge, and which should decide their respective rights as between themselves. This principle, suggested by the actual state of things, was, "that discovery gave title to the

Necessary for nations of Europe to establish some acknowledged principle in New World to avoid conflict.

government by whose subjects or by whose authority it was made, against all other European governments, which title might be consummated by possession." (8 Wheaton's Reports, 573.)

This principle, acknowledged by all Europeans, because it was the interest of all to acknowledge it, gave to the nation making the discovery, as its inevitable consequence, the sole right of acquiring the soil, and of making settlements on it. It was an exclusive principle,

Idem. which shut out the right of competition among those who had agreed to it; not one which could annul the previous rights of those who had not agreed to it. It regulated the right given by discovery among the European discoverers; but could not affect the rights of those already in possession, either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man. It gave the exclusive right to purchase, but did not found that right on a denial of the right of the possessor to sell.

The relation between the Europeans and the natives was determined in each case by the particular government which asserted and could maintain this pre-emptive privilege in the particular place. The United States succeeded to all the claims of Great Britain, both territorial and political; but no attempt, so far as is known, has been made to enlarge them. So far as they existed merely in theory, or were in their nature only exclusive of the claims of other European nations, they still retain their original character, and remain dormant. So far as they have been practically exerted, they exist in fact, are understood by both parties, are asserted by the one, and admitted by the other.

The United States succeeded to all claims of Great Britain.

Soon after Great Britain determined on planting colonies in America, the King granted charters to companies of his subjects who associated for the purpose of carrying the views of the Crown into effect, and of enriching themselves. The first of these charters was made before possession was taken of any part of the country. They purport, generally, to convey the soil from the Atlantic to the South Sea. This soil was

Charters granted to companies by King of Great Britain.

occupied by numerous and warlike nations, equally willing and able to defend their possessions. The extravagant and absurd idea that the feeble settlements made on the sea-coast, or the companies under whom they were made, acquired legitimate power by them to govern the people, or occupy the lands from sea to sea, did not enter the mind of any man. They were well understood to convey the title which, according to the common law of European sovereigns respecting America, they might rightfully convey, and no more. This was the exclusive right of purchasing such lands as the natives were willing to sell. The Crown could not be understood to grant what the Crown did not affect to claim; nor was it so understood.

What these charters purported generally to convey.

The exclusive right of purchasing such lands as the natives would sell; nothing more.

The power of making war is conferred by these charters on the colonies, but *defensive* war alone seems to have been contemplated. In the first charter to the first and second colonies, they are empowered, "for their several *defenses*, to encounter, expulse, repel, and resist, all persons who shall, without license," attempt to inhabit "within the said precincts and limits of the said several colonies, or that shall enterprise or attempt, at any time hereafter,

Power of defensive war conveyed.

the least detriment or annoyance of the said several colonies or plantations."

The charter to Connecticut concludes a general power to make defensive war with these terms: "And, upon *just causes*, to invade and destroy the natives or other enemies of the said colony."

The same power, in the same words, is conferred on the government of Rhode Island.

This power to repel invasion, and, upon just cause, to invade and destroy the natives, authorizes offensive as well as defensive war, but only on "just cause." The very terms imply the existence of a country to be invaded, and of an enemy who has given just cause of war.

The charter to William Penn contains the following recital: "And because, in so remote a country, near so many barbarous nations, the incursions, as well of the savages themselves as of other enemies, pirates, and robbers, may probably be feared, therefore we have given," etc. The instrument then confers the power of war.

These barbarous nations, whose incursions were feared, and to repel whose incursions the power to make war was given, were surely not considered as the subjects of Penn or occupying his lands during his pleasure.

The same clause is introduced into the charter to Lord Baltimore.

The charter to Georgia professes to be granted for the charitable purpose of enabling poor subjects to gain a comfortable subsistence by cultivating lands in the American provinces, "at present waste and desolate." It recites: "And whereas our provinces in North America have been frequently ravaged by Indian enemies,

Charter to Georgia outlined.

more especially that of South Carolina, which in the late war, by the neighboring savages, was laid waste by fire and sword and great numbers of the English inhabitants miserably massacred; and our loving subjects who now inhabit there, by reason of the smallness of their numbers, will in case of any new war be exposed to the like calamities, inasmuch as their whole southern frontier continueth unsettled and lieth open to the said savages."

These motives for planting the new colony are incompatible with the lofty ideas of granting the soil and all its inhabitants, from sea to sea. They demonstrate the truth that these grants asserted a title against Europeans only, and were considered as blank paper so far as the rights of the natives were concerned. The power of war is given only for defense, not for conquest.

Grants asserted title against Europeans only, not against the aborigines.

The charters contain passages showing one of their objects to be the civilization of the Indians and their conversion to Christianity — objects to be accomplished by conciliatory conduct and good example; not by extermination.

The actual state of things, and the practice of European nations, on so much of the American continent as lies between the Mississippi and the Atlantic, explain their claims and the charters they granted. Their pretensions unavoidably interfered with each other; though the discovery of one was admitted by all to exclude the claim of any other, the extent of that discovery was the subject of unceasing contest. Bloody conflicts arose between them which gave importance and security to the neighboring nations. Fierce and warlike in their character, they might be formidable enemies or effective friends. Instead of rousing their resentments, by assert-

ing claims to their lands or to dominion over their persons, their alliance was sought by flattering professions and purchased by rich presents. The English, the French and the Spaniards were equally competitors for their friendship and their aid. Not well acquainted with the exact meaning of words, nor supposing it to be material whether they were called the subjects or the children of their father in Europe; lavish in professions of duty and affection, in return for the rich presents they received; so long as their actual independence was untouched and their right to self-government acknowledged, they were willing to profess dependence on the power which furnished supplies of which they were in absolute need and restrained dangerous intruders from entering their country; and this was probably the sense in which the term was understood by them.

Certain it is that our history furnishes no example, from the first settlement of our country, of any attempt on the part of the Crown to interfere with the internal affairs of the Indians, farther than to keep out the agents of foreign powers, who, as traders or otherwise, might seduce them into foreign alliances. The King purchased their lands, when they were willing to sell, at a price they were willing to take; but never coerced a surrender of them. He also purchased their alliance and dependence by subsidies; but never intruded into the interior of their affairs, or interfered with their self-government, so far as respected themselves only.

The general views of Great Britain with regard to the Indians were detailed by Mr. Stuart, Superintendent of Indian Affairs, in a speech delivered at Mobile, in pres-

No attempt on part of the Crown to interfere with internal affairs of Indians.

ence of several persons of distinction, soon after the peace of 1763. Towards the conclusion he says: "Lastly, I inform you that it is the King's order to all his governors and subjects, to treat Indians with justice and humanity, and to forbear all encroachments on the territories allotted to them; accordingly, all individuals are prohibited from purchasing any of your lands; but, as you know, that, as your white brethren cannot feed you when you visit them unless you give them ground to plant, it is expected that you will cede lands to the King for that purpose. But whenever you shall be pleased to surrender any of your territories to his majesty, it must be done, for the future, at a public meeting of your nation, when the governors of the provinces, or the superintendent, shall be present, and obtain the consent of all your people. The boundaries of your hunting grounds will be accurately fixed, and no settlement permitted to be made upon them. As you may be assured that all treaties with your people will be faithfully kept, so it is expected that you, also, will be careful strictly to observe them."

Mr. Stuart's speech at Mobile in regard to England's relations with the Indians.

The proclamation issued by the King of Great Britain, in 1763, soon after the ratification of the articles of peace, forbids the governors of any of the colonies to grant warrants of survey, or pass patents upon any lands whatever, which, not having been ceded to, or purchased by, us (the King), as aforesaid, are reserved to the said Indians, or any of them.

Proclamation of 1763.

The proclamation proceeds: "And we do further declare it to be our royal will and pleasure, for the present, as aforesaid, to reserve, under our sovereignty, pro-

tection and dominion, for the use of the said Indians, all the lands and territories lying to the westward of
Idem. the sources of the rivers which fall into the sea from the west and northwest as aforesaid; and we do hereby strictly forbid, on pain of our displeasure, all our loving subjects from making any purchases or settlements whatever, or taking possession of any of the lands above reserved, without our special leave and license for that purpose first obtained.

“And we do further strictly enjoin and require all persons whatever, who have, either wilfully or inadvertently, seated themselves upon any lands within the countries above described, or upon any other lands, which, not having been ceded to, or purchased by, us, are still reserved to the said Indians, as aforesaid, forthwith to remove themselves from such settlements.”

A proclamation issued by Governor Gage, in 1772, contains the following passage: “Whereas
Governor Gage's proclamation of 1772. many persons, contrary to the positive orders of the King upon this subject, have undertaken to make settlements beyond the boundaries fixed by the treaties made with the Indian nations, which boundaries ought to serve as a barrier between the whites and the said nations; particularly on the Ouabache.” The proclamation orders such persons to quit those countries without delay.

Such was the policy of Great Britain towards the Indian nations inhabiting the territory from which she excluded all other Europeans, such her claims, and such her practical exposition of the charters she had granted; she considered them as nations capable of maintaining the relations of peace and war, of governing themselves, under her protection; and she made treaties with them, the obligation of which she acknowledged.

This was the settled state of things when the war of our Revolution commenced. The influence of our enemy was established; her resources enabled her to keep up that influence; and the colonists had much cause for the apprehension that the Indian nations would, as the allies of Great Britain, add their arms to hers. This, as was to be expected, became an object of great solicitude to Congress. Far from advancing a claim to their lands, or asserting any right of dominion over them, Congress resolved "that the securing and preserving the friendship of the Indian nations appears to be a subject of the utmost moment to these colonies."

The early journals of Congress exhibit the most anxious desire to conciliate the Indian nations.

Three Indian departments were established, and commissioners appointed in

Congress anxious to conciliate the Indians during Revolution.

each, "to treat with the Indians, in their respective departments, in the name and on the behalf of the United Colonies, in order to preserve peace and friendship with the said Indians, and to prevent their taking any part in the present commotions."

The most strenuous exertions were made to procure those supplies on which Indian friendships were supposed to depend, and everything which might excite hostility was avoided.

First treaty with Delawares September, 1778.

The first treaty was made with the Delawares in September, 1778.

The language of equality in which it is drawn evinces the temper with which the negotiation was undertaken, and the opinion which then prevailed in the United States.

"1. That all offenses or acts of hostilities, by one or either of the contracting parties against the other, be

mutually forgiven and buried in the depth of oblivion, never more to be had in remembrance.

“2. That a perpetual peace and friendship shall, from henceforth, take place and subsist between the contracting parties aforesaid, through all succeeding generations; and if either of the parties are engaged in a just and necessary war with any other nation or nations, that then each shall assist the other, in due proportion to their abilities, till their enemies are brought to reasonable terms of accommodation,” etc.

3. The third article stipulates, among other things, a free passage for the American troops through the Delaware Nation; and engages that they shall be furnished with provisions and other necessaries at their value.

“4. For the better security of the peace and friendship now entered into by the contracting parties against all infractions of the same by the citizens of either party, to the prejudice of the other, neither party shall proceed to the infliction of punishments on the citizens of the other, otherwise than by securing the offender or offenders, by imprisonment, or any other competent means, till a fair and impartial trial can be had by judges or juries of both parties, as near as can be to the laws, customs, and usages of the contracting parties, and natural justice,” etc.

5. The fifth article regulates the trade between the contracting parties in a manner entirely equal.

6. The sixth article is entitled to peculiar attention, as it contains a disclaimer of designs which were, at that time ascribed to the United States by their enemies, and from the imputation of which Congress was then peculiarly anxious to free the government. It is in these words: “Whereas the enemies of the United States

have endeavored, by every artifice in their power, to possess the Indians in general with an opinion that it is the design of the States aforesaid to extirpate the Indians, and take possession of their country; to obviate such false suggestion the United States do engage to guaranty to the aforesaid nation of Delawares, and their heirs, all their territorial rights, in the fullest and most ample manner, as it hath been bounded by former treaties, as long as the said Delaware Nation shall abide by and hold fast the chain of friendship now entered into."

The parties further agree that other tribes, friendly to the interests of the United States, may be invited to form a State, whereof the Delaware Nation shall be the heads, and have a representation in Congress.

This treaty, in its language, and in its provisions, is formed, as near as may be, on the model of treaties between the crowned heads of Europe.

The sixth article shows how Congress then treated the injurious calumny of cherishing designs unfriendly to the political and civil rights of the Indians.

During the war of the Revolution the Cherokees took part with the British. After its termination, the United States, though

Cherokees took part of British in war of Revolution.

desirous of peace, did not feel its necessity so strongly as while the war continued. Their political situation being changed, they might very well think it advisable to assume a higher tone, and to impress on the Cherokees the same respect for Congress which was before felt for the King of Great Britain. This may account for the language of the treaty of Hopewell. There is the more reason for supposing that the Cherokee chiefs were not very critical judges of the language from the fact that every one makes his mark;

no chief was capable of signing his name. It is probable the treaty was interpreted to them.

The treaty is introduced with the declaration that
Treaty of Hopewell. "the commissioners plenipotentiary of the United States give peace to all the Cherokees, and receive them into the favor and protection of the United States of America, on the following conditions."

When the United States gave peace, did they not also receive it? Were not both parties desirous of it? If we consult the history of the day, does it not inform us that the United States were at least as anxious to obtain it as the Cherokees? We may ask, further, did the Cherokees come to the seat of the American government to solicit peace, or did the American commissioners go to them to obtain it? The treaty was made at Hopewell, not at New York. The word "give," then, has no real importance attached to it.

The first and second articles stipulate for the mutual restoration of prisoners, and are, of course, equal.

The third article acknowledges the Cherokees to be under the protection of the United States of America, and of no other power.

This stipulation is found in Indian treaties, generally. It was introduced into their treaties with Great Britain; and may, probably, be found in those with other European powers. Its origin may be traced to the nature of their connection with those powers; and its true meaning is discerned in their relative situation.

The general law of European sovereigns respecting their claims in America limited the intercourse of Indians, in a great degree, to the particular potentate whose ultimate right of domain was acknowledged by the others.

This was the general state of things in time of peace. It was sometimes changed in war. The consequence was that their supplies were derived chiefly from that nation, and their trade confined to it. Goods, indispensable to their comfort, in the shape of presents, were received from the same hand. What was of still more importance, the strong hand of government was interposed to restrain the disorderly and licentious from intrusions into their country, from encroachments on their lands, and from those acts of violence which were often attended by reciprocal murder. The Indians perceived in this protection only what was beneficial to themselves — an engagement to punish aggressions on them. It involved, practically, no claim to their lands, no dominion over their persons. It merely bound the nation to the British Crown, as a dependent ally, claiming the protection of a powerful friend and neighbor, and receiving the advantages of that protection, without involving a surrender of their national character.

This is the true meaning of the stipulation, and is, undoubtedly, the sense in which it was made. Neither the British government, nor the Cherokees, ever understood it otherwise.

The same stipulation entered into with the United States is, undoubtedly, to be construed in the same manner. They receive the Cherokee Nation into their favor and protection. The Cherokees acknowledge themselves to be under the protection of the United States, and of no other power. Protection does not imply the destruction of the protected. The manner in which this stipulation was understood by the American government is explained by the language and acts of our first President.

Cherokees acknowledged themselves under protection of United States.

The fourth article draws the boundary between the Indians and the citizens of the United States. But in describing this boundary, the term "allotted" and the term "hunting ground" are used.

Is it reasonable to suppose that the Indians, who could not write, and, most probably, could not read, who certainly were not critical judges of our language, should distinguish the word "allotted" from the words "marked out?" The actual subject of contract was the dividing line between the two nations, and their attention may very well be supposed to have been confined to that subject. When, in fact, they were ceding lands to the United States, and describing the extent of their cession, it may very well be supposed that they might not understand the term employed as indicating that, instead of granting, they were receiving lands. If the term would admit of no other signification, which is not conceded, its being misunderstood is so apparent, results so necessarily from the whole transaction, that it must, we think, be taken in the sense in which it was, most obviously, used.

So with respect to the words "hunting grounds." Hunting was at that time the principal occupation of the Indians, and their land was more used for that purpose than for any other. It could not, however, be supposed that any intention existed of restricting the full use of the lands they reserved.

To the United States it could be a matter of no concern whether their whole territory was devoted to hunting grounds, or whether an occasional village and an occasional cornfield interrupted and gave some variety to the scene.

These terms had been used in their treaties with Great

Words "hunting grounds."

Britain, and had never been misunderstood. They had never been supposed to imply a right in the British government to take their lands, or to interfere with their internal government.

The fifth article withdraws the protection of the United States from any citizen who has settled, or shall settle, on the lands allotted to the Indians for their hunting grounds; and stipulates that, if he shall not remove within six months, the Indians may punish him.

The sixth and seventh articles stipulate for the punishment of the citizens of either country who may commit offenses on or against the citizens of the other. The only inference to be drawn from them is that the United States considered the Cherokees as a nation.

The ninth article is in these words: "For the benefit and comfort of the Indians, and for the prevention of injuries or oppression on the part of the citizens or Indians, the United States, in Congress assembled, shall have the sole and exclusive right of regulating the trade with the Indians, and *managing all their affairs* as they think proper."

Wording of ninth article.

To construe the expression, "managing all their affairs," into a surrender of self-government, would be, we think, a perversion of their necessary meaning, and a departure from the construction which has been uniformly put on them. The great subject of the article is the Indian trade. The influence it gave made it desirable that Congress should possess it. The commissioners brought forward the claim with the profession that their motive was "the benefit and comfort of the Indians, and the prevention of injuries or oppressions." This may be true as respects the regulation of their trade, and as respects the

Construction of the words "managing all their affairs."

regulation of all affairs connected with their trade, but cannot be true as respects the management of all their affairs. The most important of these are the cession of their lands, and security against intruders on them. Is it credible that they should have considered themselves as surrendering to the United States the right to dictate their future cessions, and the terms on which they should

Not meant as a surrender of self-government.

be made? or to compel their submission to the violence of disorderly and licentious intruders? It is equally inconceivable that they could have supposed themselves, by a phrase thus slipped into an article on another and most interesting subject, to have divested themselves of the right of self-government on subjects not connected with trade. Such a measure could not be "for their benefit and comfort," or for "the prevention of injuries and oppression." Such a construction would be inconsistent with the spirit of this and of all subsequent treaties; especially of those articles which recognize the right of the Cherokees to declare hostilities, and to make war. It would convert a treaty of peace covertly into an act annihilating the political existence of one of the parties. Had such a result been intended it would have been openly avowed.

This treaty contains a few terms capable of being used in a sense which could not have been intended at the time, and which is inconsistent with the practical construction which has always been put on them; but its essential articles treat the Cherokees as a nation capable of maintaining the relations of peace and war, and ascertain the boundaries between them and the United States.

The treaty of Hopewell seems not to have established

a solid peace. To accommodate the differences still existing between the State of Georgia and the Cherokee Nation, the treaty of Holston was negotiated in July, 1791.

Treaty of Hopewell did not establish solid peace.

The existing Constitution of the United States had been then adopted, and the government, having more intrinsic capacity to enforce its just claims, was, perhaps, less mindful of high-sounding expressions, denoting superiority. We hear no more of giving peace to the Cherokees. The mutual desire of establishing permanent peace and friendship, and of removing all causes of war, is honestly avowed, and, in pursuance of this desire, the first article declares that there shall be perpetual peace and friendship between all the citizens of the United States of America and all the individuals composing the Cherokee Nation.

Treaty of Holston negotiated in July, 1791.

The second article repeats the important acknowledgment that the Cherokee Nation is under the protection of the United States of America, and of no other sovereign whosoever.

The meaning of this has been already explained. The Indian nations were, from their situation, necessarily dependent on some foreign potentate for the supply of their essential wants, and for their protection from lawless and injurious intrusions into their country. That power was naturally termed their protector. They had been arranged under the protection of Great Britain; but the extinguishment of the British power in their neighborhood, and the establishment of that of the United States in its place, led naturally to the declaration, on the part of the Cherokees, that they were under the protection of the United States,

Treaty outlined.

and of no other power. They assumed the relation with the United States which had before subsisted with Great Britain.

This relation was that of a nation claiming and receiving the protection of one more powerful; not that of individuals abandoning their national character and submitting as subjects to the laws of a master.

The third article contains a perfectly equal stipulation for the surrender of prisoners.

The fourth article declares that "the boundary between the United States and the Cherokee Nation shall be as follows: beginning," etc. We hear no more of "allotments" or of "hunting grounds."

Words "allotment" and "hunting grounds" not mentioned in this treaty, but boundaries established.

A boundary is described, between nation and nation, by mutual consent. The national character of each, the ability of each to establish this boundary, is acknowledged by the other. To preclude forever all disputes, it is agreed that it shall be plainly marked by commissioners to be appointed by each party; and in order to extinguish forever all claim of the Cherokees to the ceded lands, an additional consideration is to be paid by the United States. For this additional consideration the Cherokees release all right to the ceded land forever.

By the fifth article the Cherokees allow the United States a road through their country, and the navigation of the Tennessee River. The acceptance of these cessions is an acknowledgment of the right of the Cherokees to make or withhold them.

By the sixth article it is agreed, on the part of the Cherokees, that the United States shall have the sole and exclusive right of regulating their trade. No claim is made to the management of all their affairs. This

stipulation has already been explained. The observation may be repeated, that the stipulation is itself an admission of their right to make or refuse it.

By the seventh article the United States solemnly guaranty to the Cherokee Nation all their lands not hereby ceded.

The eighth article relinquishes to the Cherokees any citizens of the United States who may settle on their lands; and the ninth forbids any citizen of the United States to hunt on their lands, or to enter their country without a passport.

The remaining articles are equal, and contain stipulations which could be made only with a nation admitted to be capable of governing itself.

This treaty, thus explicitly recognizing the national character of the Cherokees and their right of self-government, thus guarantying their lands, assuming the duty of protection, and, of course, pledging the faith of the United States for that protection, has been frequently renewed, and is now in full force.

Holston treaty recognizes national character and right of self-government of the Cherokees.

To the general pledge of protection have been added several specific pledges, deemed valuable by the Indians. Some of these restrain the citizens of the United States from encroachments on the Cherokee country, and provide for the punishment of intruders.

From the commencement of our Government Congress has passed acts to regulate trade and intercourse with the Indians, which treat them as nations, respect their rights, and manifest a firm purpose to afford that protection which treaties stipulate. All these acts, and especially that of 1802, which is still in force, manifestly consider the several Indian nations as distinct political

communities, having territorial boundaries, within which their authority is exclusive, and having a right to all the lands within those boundaries, which is not only acknowledged, but guaranteed by the United States.

In 1819 Congress passed an act for promoting those humane designs of civilizing the neighboring Indians which had long been cherished by the Executive. It enacts "that, for the purpose of providing against the further decline and final extinction of the Indian tribes adjoining to the frontier settlements of the United States, and for introducing among them the habits and arts of civilization, the President of the United States shall be, and he is hereby authorized, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced *with their own consent*, to employ capable persons, of good moral character, to instruct them in the mode of agriculture suited to their situation, and for teaching their children in reading, writing and arithmetic, and for performing such other duties as may be enjoined, according to such instructions and rules as the President may give and prescribe for the regulation of their conduct in the discharge of their duties."

This act avowedly contemplates the preservation of the Indian nations as an object sought by the United States, and proposes to effect this object by civilizing and converting them from hunters into agriculturists. Though the Cherokees had already made considerable progress in this improvement, it cannot be doubted that the general words of the act comprehend them. Their advance in "the habits and arts of civilization" rather encour-

Humane designs of
act of Congress of
1819.

This act contemplates
their advance in "the
habits and arts of civ-
ilization."

aged perseverance in the laudable exertions still further to meliorate their condition. This act furnishes strong additional evidence of a settled purpose to fix the Indians in their country by giving them security at home.

The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the States; and provide that all intercourse with them shall be carried on exclusively by the government of the Union.

What these treaties contemplate otherwise.

Is this the rightful exercise of power, or is it usurpation?

While these States were colonies, this power, in its utmost extent, was admitted to reside in the Crown. When our revolutionary struggle commenced, Congress was composed of an assemblage of deputies acting under specific powers granted by the Legislatures or conventions of the several colonies. It was a great popular movement, not perfectly organized; nor were the respective powers of those

Is the provision that all intercourse with the Indians shall be carried on exclusively by the Government of the Union a rightful exercise of power, or is it usurpation?

who were intrusted with the management of affairs accurately defined. The necessities of our situation produced a general conviction that those measures which concerned all must be transacted by a body in which the representatives of all were assembled, and which could command the confidence of all; Congress, therefore, was considered as invested with all the powers of war and peace, and Congress dissolved our connection with the mother country, and declared these United Colonies to be independent States. Without any written definition of powers, they employed diplomatic agents to represent the United States at the several courts of Europe; offered

to negotiate treaties with them, and did actually negotiate treaties with France. From the same necessity, and on the same principles, Congress assumed the management of Indian affairs; first in the name of these United Colonies; and afterwards, in the name of the United States. Early attempts were made at negotiation, and to regulate trade with them. These not proving successful, war was carried on under the direction and with the forces of the United States, and the efforts to make peace, by treaty, were earnest and incessant. The Confederation found Congress in the exercise of the same powers of peace and war, in our relations with Indian nations, as with those of Europe.

Such was the state of things when the Confederation was adopted. That instrument surrendered the powers of peace and war to Congress, and prohibited them to the States, respectively, unless a State be actually invaded, "or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of delay till the United States in Congress assembled can be consulted." This instrument also gave the United States in Congress assembled the sole and exclusive right of "regulating the trade and managing all the affairs with the Indians, not members of any of the States; provided that the legislative power of any State within its own limits be not infringed or violated."

The ambiguous phrases which follow the grant of power to the United States were so construed by the States of North Carolina and Georgia as to annul the power itself. The discontents and confusion resulting from these conflicting claims produced representations to Congress, which were

Report of committee
of 1787.

referred to a committee, who made their report in 1787. The report does not assent to the construction of the two States, but recommends an accommodation, by liberal cessions of territory, or by an admission, on their part, of the powers claimed by Congress. The correct exposition of this article is rendered unnecessary by the adoption of our existing Constitution. That instrument confers on Congress the powers of war and peace, of making treaties, and of regulating commerce with foreign nations, and among the several States, and *with the Indian tribes*. These powers comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free actions. The shackles imposed on this power in the Confederation are discarded.

The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed; and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term "nation," so generally applied to them, means "a people distinct from others." The Constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and, consequently, admits their rank among those powers who are capable of making

Indian nations always considered as distinct, independent political communities.

The very term "nation" tends to prove this.

treaties. The words "treaty" and "nation" are words of our own language, selected in our diplomatic and legislative proceedings by ourselves, having each a definite and well understood meaning. We have applied them to Indians, as we have applied them to the other nations of the earth. They are applied to all in the same sense.

Georgia herself has furnished conclusive evidence that her former opinions on this subject concurred with those entertained by her sister States, and by the government of the United States. Various acts of her Legislature have been cited in the argument, including the contract of cession made in the year 1802, all tending to prove her acquiescence in the universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States with their consent; that their territory was separated from that of any State within whose chartered limits they might reside, by a boundary line established by treaties; that within their boundary they possessed rights with which no State could interfere; and that the whole power of regulating the intercourse with them was vested in the United States. A review of these acts on the part of Georgia would occupy too much time, and is the less necessary because they have been accurately detailed in the argument at the bar. Her new series of laws, manifesting her abandonment of these opinions, appears to have commenced in December, 1828.

In opposition to this original right, possessed by the undisputed occupants of every country; to this recognition of that right, which is evidenced by our history, in every change through which we have passed; is placed

the charters granted by the monarch of a distant and distinct region, parceling out a territory in possession of others, whom he could not remove, and did not attempt to remove, and the cession made of his claims by the treaty of peace.

The actual state of things at the time, and all history since, explain these charters; and the King of Great Britain at the treaty of peace could cede only what belonged to his crown. These newly asserted titles can derive no aid from the articles, so often repeated in Indian treaties, extending to them, first, the protection of Great Britain, and afterwards that of the United States. These articles are associated with others, recognizing their title to self-government. The very fact of repeated treaties with them recognizes it; and the settled doctrine of the law of nations is, that a weaker power does not surrender its independence, its right to self-government, by associating with a stronger, and taking its protection.

A weak State, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of self-

A weak State may place itself under the protection of a powerful one without relinquishing the right of self-government.

government, and ceasing to be a State. Examples of this kind are not wanting in Europe. "Tributary and feudatory States," says Vattel, "do not thereby cease to be sovereign and independent States,

so long as self-government and sovereign and independent authority are

Vattel quoted to prove this proposition.

left in the administration of the State." At the present day, more than one State may be considered as holding its right of self-government under the guaranty and protection of one or more allies.

The Cherokee Nation, then, is a distinct community,

occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of Congress. The whole intercourse between the United States and this nation is by our Constitution and laws vested in the government of the United States.

Why act of Georgia under which the plaintiff was prosecuted is void.

The act of the State of Georgia under which the plaintiff in error was prosecuted is consequently void and the judgment a nullity. Can this court revise and reverse it?

Can this court revise and reverse it?

If the objection to the system of legislation lately adopted by the Legislature of Georgia, in relation to the Cherokee Nation, was confined to its extra-territorial operation, the objection, though complete so far as respected mere right, would give this court no power over the subject. But it goes much further. If the review which has been taken be correct, and we think it is, the acts of Georgia are repugnant to the Constitution, laws and treaties of the United States.

Repugnant to the Constitution, laws and treaties of the United States.

They interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which, according to the settled principles of our Constitution, is committed exclusively to the government of the Union.

They are in direct hostility with treaties, repeated in a succession of years, which mark out the boundary that separates the Cherokee country from Georgia, guaranty to them all the land within their boundary, solemnly pledge the faith of the United States to restrain their

citizens from trespassing on it, and recognize the pre-existing power of the nation to govern itself.

They are in equal hostility with the acts of Congress for regulating this intercourse and giving effect to the treaties.

The forcible seizure and abduction of the plaintiff in error, who was residing in the nation with its permission and by authority of the President of the United States, is also a violation of the acts which authorize the Chief Magistrate to exercise this authority.

Will these powerful considerations avail the plaintiff in error? We think they will. He was seized and forcibly carried away while under guardianship of treaties guarantying the country in which he resided and taking it under the protection of the United States. He was seized while performing, under the sanction of the Chief Magistrate of the Union, those duties which the humane policy adopted by Congress had recommended. He was apprehended, tried and condemned under color of a law which has been shown to be repugnant to the Constitution, laws and treaties of the United States. Had a judgment, liable to the same objections, been rendered for property, none would question the jurisdiction of this court. It cannot be less clear when the judgment affects personal liberty, and inflicts disgraceful punishment, if punishment could disgrace when inflicted on innocence. The plaintiff in error is not less interested in the operation of this unconstitutional law than if it affected his property. He is not less entitled to the protection of the Constitution, laws and treaties of his country.

This point has been elaborately argued, and, after deliberate consideration, decided, in the case of *Cohens v.*

The Commonwealth of Virginia (6 Wheaton's Reports, 264).

It is the opinion of this court that the judgment of the Superior Court for the county of Gwinnett, in the State of Georgia, condemning Samuel A. Worcester to hard labor in the penitentiary of the State of Georgia for four years, was pronounced by that court under color of a law which is void, as being repugnant to the Constitution, treaties and laws of the United States, and ought, therefore, to be reversed and annulled.

Judgment of Superior Court reversed and annulled.

NOTE.

"Marshall had devoted a third of a century to the duties of his high office when he came to *Worcester v. Georgia*, the last of his great opinions. The years had brought to his intellectual powers, not failure, but fruition. . . . This is not entitled to be considered his greatest opinion, because others involved questions much more vitally affecting the Nation. . . . Juridical literature does not suggest another whose resources would have been adequate to the production of this opinion. It is the opinion of the philanthropist, the champion of treaty obligations, the historian of the Colonies and of the Revolution, the master of the law among nations, and the father of constitutional interpretation." *Chief Justice John A. Sharuck*, Marshall Memorial, II, 234, 235. For references to this case see Kent, Com. (12th Ed.), III, 382 *et seq.*; Thorpe, Const. Hist. of U. S., II, 388, 499, 500; Von Holst, Const. Hist. of U. S., I, 456, 457, 458; Tucker, Const. of U. S., II, 558; Miller, Const. of U. S., 401, 402; Story, Com. Const., II, 540, 541; Carson, Hist. Sup. Court, 269, 642, 651. See notes to the case of *Cherokee Nation v. State of Georgia*, *ante*.

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THE FIFTH AMENDMENT OF THE CONSTITUTION AS TO THE POWER OF EMINENT DOMAIN APPLIES ONLY TO THE UNITED STATES AND HAS NO APPLICATION TO THE SEVERAL STATES.

In the next case—*Barron v. Baltimore*—was first decided the important point that the Fifth Amendment to the Constitution, prohibiting the taking of private property for public use without just compensation, applied only to the exercise of the power of eminent domain by the United States government, and had no application to the States.

The following is the language of the Fifth Amendment so far as relates to the portion thereof construed in the present case: "No person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation."

All of the original States in their Constitutions provided for the security of private property as well as of life and liberty, usually in the terms of the famous 39th article of the Magna Charta, which protected the people from arbitrary imprisonment and arbitrary spoliation, or by claiming for themselves all of the liberties and rights set forth in the great charter. Encroachments from the General Government were feared, and this led to the speedy adoption of the first ten amendments to the Constitution. This fact is referred to by the Chief Justice in his opinion.

In the Slaughter-House Cases Mr. Justice Miller says: "The adoption of the first eleven amendments to the Constitution so soon after the original instrument was accepted shows a prevailing sense of danger from the Federal power."¹

The opinion of Chief Justice Marshall demonstrates that the language of the Fifth Amendment above quoted, although general, and not referring in terms to the General Government or to the States, was, nevertheless, as shown by its history, by its terms and by its comparison with other portions of the Constitution, a limitation upon the power of the General Government, and was not at all applicable to the States. So far, therefore, as the States were concerned, where their legislation was exercised in such a manner as not to interfere with rights conferred by and held under the Constitution, laws and treaties of the United States, they were not subject to any control on the part of the General Government. This remained until the adoption of the Fourteenth Amendment of the Constitution in 1868, which ordained, among other things, section I, "Nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

This great amendment, now rapidly undergoing judicial exposition and development, does not deprive the States of their autonomy or rightful powers subject to the Federal Constitution to regulate their own domestic concerns. Nevertheless, in the vital matter specified in that Amendment, namely, life, liberty and property, and the equal protection of the law, it does operate as an ex-

¹ 16 Wallace Rep. 36. See Guthrie, Lectures on the Fourteenth Amendment, 20, 21.

press limitation upon the powers of the States. It makes all these National rights. Under the Fifth Amendment these rights are protected from invasion by Congress or the Federal Government. By the Fourteenth Amendment they are each protected from invasion by State Legislatures or by the people of the States in any form in which they may attempt to exercise political or judicial power. The Fifth and Fourteenth Amendments, therefore, are complementary, and together make these great rights of life, liberty, property, contracts and equality before the law the fundamental and indestructible rights of all the people of the United States.¹

The Fourteenth Amendment has been called the new charter of American liberty. Mr. Justice Field's statement of its effect is very striking: "It is the shield which the arm of our blessed government holds at all times over every one, man, woman and child, in all its broad domain, wherever they may go and in whatever relations they may be placed. No State — such is the sovereign command of the whole people of the United States — no State shall touch the life, liberty or property of any person, however humble his lot or exalted his station, without due process of law; and no State, even with due process of law, shall deny to any person within its jurisdiction the general protection of the laws."

¹ Dillon, *Laws and Jurisprudence*, Lecture VII, pages 196-215. The reader may usefully consult Mr. Guthrie's valuable *Lectures on the Fourteenth Amendment*. Boston, 1898.

Barron v. The Mayor and City Council of Baltimore.¹

January Term, 1833.

[7 Peters' Reports, 243-251.]

The proposition of law decided is thus stated by Mr. Justice Curtis in his edition of Decisions of the Supreme Court of the United States:

The provision in the Fifth Amendment of the Constitution declaring that private property shall not be taken for public use without just compensation is only a limitation of the power of the United States; it is not applicable to the legislation of the several States.

Barron and others owned a very valuable wharf in Baltimore harbor; the city by embankments and other means so directed certain streams of water as to collect the sand about this wharf to such a degree as to impair its value. Barron sued the city, and obtained a judgment in the County Court, which was reversed by the Court of Appeals. He then sued out a writ of error to the Supreme Court,² the opinion of which was delivered as follows:

¹ This was the last case in which Chief Justice Marshall, as the organ of the court, discussed a constitutional question, although the reports show that down to and including the January Term, 1835, he took his accustomed part in the work of the court.

² The court was constituted as follows:

JOHN MARSHALL, *Chief Justice.*

BUSHROD WASHINGTON,

JOSEPH STORY,

GABRIEL DUVALL,

SMITH THOMPSON,

JOHN McLEAN,

HENRY BALDWIN (absent).

} *Associate Justices.*

Mr. Moyer appeared for plaintiff in error.

Mr. Taney and Mr. Scott appeared for defendants in error.

MARSHALL, Chief Justice. The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it, unless it be shown to come within the provisions of the twenty-fifth section of the Judicial Act.

The plaintiff in error contends that it comes within that clause in the Fifth Amendment to the Constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance, but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a Constitution for itself, and in that Constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily, applicable to the government created by the

Contention of the plaintiff that the Fifth Amendment, as regards eminent domain, should be construed as a limitation on State legislation as well as a restraint on power of General Government.

Why the Fifth Amendment is not applicable to the several States.

instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the Fifth Amendment must be understood as restraining the power of the General Government, not as applicable to the States. In their several Constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State governments, as well as against that which might be attempted by their General Government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article.

We think that section affords a strong, if not a conclusive, argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the General Government. Some of them use language applicable only to Congress; others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or *ex post facto* law shall be passed." No language can be more general; yet the demonstration is complete, that it applies solely to the Government of the United States. In addition to the general arguments

furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or *ex post facto* law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on State legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the General Government, the tenth proceeds to enumerate those which were to operate on the State Legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any

The ninth section enumerates the limitations imposed on the General Government.

treaty," etc. Perceiving that, in a Constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the State government, unless expressed in terms, the restrictions contained in the tenth section are in direct words so applied to the States.

Tenth section enumerates the limitations on State Legislatures.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the General Government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance, or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power which is conferred entirely on the General Government, if with each other, for political purposes, they can scarcely fail

Limitations on the powers of the States — Examples of.

Limitations on the powers of the States — Examples of.

to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal would lead directly to war, the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the General Government

Line of logical reasoning why Fifth Amendment is considered a limitation on the power of the General Government only.

and on those of the States; if, in every inhibition intended to act on State power, words are employed which directly express that intent, some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them, required changes in their Constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of pro-

Idem.

curing a recommendation from two-thirds of Congress, and the assent of three-fourths of their sister States, could never have occurred to any human being as a mode of doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments, they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the Constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers, which the patriot statesmen, who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the General Government, not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amend-

ments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the Fifth Amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the Government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion that there is no repugnancy between the several acts of the General Assembly of Maryland, given in evidence by the defendants at the trial of this cause in the court of that State, and the Constitution of the United States. This court, therefore, has no jurisdiction of the cause; and it is dismissed.¹

The Fifth Amendment is a limitation on the power of the General Government only and not a limitation on the power of the State Legislatures.

NOTE.

Referring to the first eleven amendments to the Constitution Mr. Justice Miller says: "In those amendments, if they are carefully examined, may be plainly seen this distrust of the power of the central government, and this desire to protect the States from being overwhelmed and annihilated by its exercise. The contest has continued to the present time. It would be well for the country if it could be said that it had been settled by the results of the recent war, but while it has undergone considerable discussion it has not been finally determined. It is sufficient to say here, although others may disagree with this conclusion, that the experience of a century under the government as it was then organized has shown that the danger to its perpetuity and to the people of this country did not lie in the aggrandizement of the central authority,

¹ The decision in this case was strictly in accord with that of *Corfield v. Coryell*, 4 Wash. C. C. 871, in the Pennsylvania Circuit, and delivered by Justice Washington some eight years previous.

but rather in the power that remained in the several States." Miller, Const. of U. S. 93.

"On account of the fundamental idea from which these ten additional articles sprang, they were and are often called the American Bill of Rights." Von Holst, Const. Law of the U. S. 29. See also Marshall, C. J., in *Sturges v. Crowninshield*, *ante*, pp. 226-251; Carson, Hist. Sup. Court, 266. "Hence follows directly the important principle that (as the courts have always held) all prohibitory clauses of the Constitution containing no words extending their import bind only the Federal powers." Von Holst, Const. Law of U. S. 224.

In the case of *Kohl v. United States*, 91 U. S. 367 (1875), the Supreme Court for the first time directly held that under the Constitution the United States Government had power to condemn or appropriate lands or other property within the States for National use, and to enable it to perform its proper functions, making just compensation therefor. That doctrine has never since been denied. Concerning the right of eminent domain in general, the effect of the Fifth Amendment and the measure of compensation to be made by the General Government, see the admirable and learned judgment of Mr. Justice Brewer, in *Monongahela (etc.) Company v. United States*, 148 U. S. 312 (1893). Guthrie, *Lectures on the Fourteenth Amendment*, reviews and comments on the cases in the Supreme Court as to the effect of that amendment on the power of eminent domain, 89-95. See also cases on Eminent Domain collected, Thayer, *Cases on Constitutional Law*, 945-1189, with notes; Cooley, Const. Lim. 525, 526.

REFERENCES TO *BARRON v. THE MAYOR OF BALTIMORE*,
IN MARSHALL MEMORIAL.

VOL. II.

Hampton L. Carson, Esq., p. 261; Hon. William Lindsay, p. 357.

APPENDIX.

To the end that the present work shall be complete, that is, comprise all of the judicial opinions of Chief Justice Marshall expounding the Constitution, the Editor includes in the Appendix two of Marshall's decisions on the Circuit (reported by Brockenbrough) in cases which never went to the Supreme Court.

The first of these — *Brig Wilson v. United States* — construed the commerce clause of the Constitution, and held that it comprehended vessels and navigation as well as cargoes, and that it authorized Congress, under penalty of forfeiture of the vessel, to prohibit the importation, bringing in or landing of any negro, mulatto or person of color.

The second of these cases — *United States v. Maurice* — related to the nature and extent of the important power under the Constitution to create or establish offices of the General Government, and also to the power of the President to appoint officers for such offices.

THE POWER OF CONGRESS TO REGULATE COMMERCE EXTENDS AS WELL TO NAVIGATION AND VESSELS AS TO CARGOES.

The next case — The Brig Wilson v. United States — involving a construction of the commerce clause of the Constitution, came before the Chief Justice, and was decided by him on the Circuit in 1820.

The Wilson, a South American privateer commissioned by the government of Buenos Ayres, brought into Norfolk, Virginia (whither she came to refit), certain cases of spirits taken from a prize she had captured, which spirits she had kept as stores, but did not enter them according to law. She also landed some colored sailors, contrary, as it was claimed, to the laws of the United States. She was libeled by the United States for these alleged violations of law, and was adjudged to be forfeited by the District Court. Her commander appealed to the Circuit Court.

The Brig Wilson v. The United States.

**Circuit Court District Va. and N. C., May Term, 1820, before Marshall,
Chief Justice.**

[1 Brockenbrough's Reports, 423-439.]

The propositions of law decided in the case were these:

The customs laws of the United States which except from their operation "ships or vessels of war" do not apply to privateers unless they fraudulently attempt to import goods under the garb of their military character.

Congress had the power under the commerce clause of the Constitution to pass the act of February 28, 1803, which prohibited the importation or bringing into or landing, under penalty of forfeiture of the vessel, of any negro, mulatto or person of color. But the Chief Justice held that this act, properly construed, did not comprehend the crew of a vessel actually employed in her navigation and not put on board in fraud of the law.

The following is the opinion of the Chief Justice so far as it relates to the constitutionality of the above mentioned act of Congress of February 28, 1803:

MARSHALL, Chief Justice. The first question which will be considered in this part of the case will be the constitutionality of the act of Congress under which this condemnation has been made. Opinion.

It will readily be admitted that the power of the Legislature of the Union on this subject is derived entirely from the third clause of the eighth section of the first article of the Constitution. That clause enables Congress "to regulate commerce with foreign nations, and among the several States, and with the Indian tribes."

Power of Legislature derived from clause in Constitution "to regulate commerce," etc.

What is the extent of this power to regulate commerce? Does it not comprehend the navigation of the country? May not the vessels, as well as the articles they bring, be regulated? Upon what principle is it that the ships of any foreign nation have been forbidden, under pain of forfeiture, to enter our ports? The authority to make such laws has never been questioned; and yet it can be sustained by no other

Extent of this power.

clause in the Constitution than that which enables Congress to regulate commerce. If this power over vessels is not in Congress, where does it reside?

*Extent of power under
clause in Constitution.*

Certainly it is not annihilated; and if not, it must reside somewhere. Does it

reside in the States? No American politician has ever been so extravagant as to contend for this. No man has been wild enough to maintain that, although the power to regulate commerce gives Congress an unlimited power over the cargoes, it does not enable that body to control the vehicle in which they are imported; that, while the whole power of commerce is vested in Congress, the State Legislatures may confiscate every vessel which enters their ports, and Congress is unable to prevent their entry. Let it be admitted, for the sake of argument, that a law forbidding a free man of any color to come into the United States would be void, and that no penalty imposed on him by Congress could be enforced; still, the vessel which should bring him into the United States might be forfeited, and that forfeiture enforced; since

Idem. even an empty vessel, or a packet employed solely

in the conveyance of passengers and letters, may be regulated and forfeited. There is not in the Constitution one syllable on the subject of navigation. And yet every power that pertains to navigation has been uniformly exercised, and, in the opinion of all, been rightfully exercised by Congress. From the adoption of the Constitution till this time the universal sense of America has been that the word "commerce," as used in that instrument, is to be considered a generic term, comprehending navigation, or, that a control over navigation is necessarily incidental to the power to regulate commerce.

I could feel no difficulty in saying that the power to

regulate commerce clearly comprehended the case, were there no other clauses in the Constitution showing the sense of the convention on that subject. But there is a clause which would remove the doubt, if any could exist.

The first clause of the ninth section declares that "the migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year 1808." This has been truly said to be a limitation of the power of Congress to regulate commerce, and it will not be pretended that a limitation of a power is to be construed into a grant of power. But though ^{Idem.} such a limitation be not a grant, it is certainly evidence of the extent which those who made both the grant and limitation attributed to the grant. The framers of our Constitution could never have declared that a given power should not, for a limited time, be exercised on a particular object, if, in their opinion, it could never be exercised on that object.

Suppose the grant and the limitation be brought together, the clause would read thus: "Congress shall have power to regulate commerce, etc., but this power shall not be so exercised as to prohibit the migration or importation of such persons as any of the States now existing may think proper to admit, prior to the year 1808." Would it be possible to doubt that the power to regulate commerce, in the sense in which those words were used in the Constitution, included the power to prohibit the migration or importation of any persons whatever into the States, except so far as this power might be restrained by other clauses of the Constitution? I think it would be impossible. It appears to me, then, that the power of Congress over vessels, which might

bring in persons of any description whatever, was complete before the year 1808, except that it could not be so exercised as to prohibit the importation or migration of any persons whom any State, in existence at the formation of the Constitution, might think proper to admit. The act of Congress, then, is to be construed with a view to this restriction on the power of the Legislature; and the only question will be, whether it comprehends this case.

The case is, that the Brig Wilson, a private armed cruiser, commissioned by the government of Buenos Ayres, came into Norfolk navigated by a crew some of whom were people of color. They were, however, all free men, and all of them sailors composing a part of the crew. While in port some of them were discharged and came on shore.

The libel charges that three persons of color were landed from the vessel, whose admission or importation was prohibited by the laws of Virginia, contrary to the act of Congress, by which the vessel was forfeited.

Is this case within the act of Congress, passed the 28th of February, 1803?

How the case arose.

The Chief Justice then proceeds to consider the act of Congress, and reaches the conclusion that it does not extend to or apply to the case before him, and that no forfeiture of the vessel had been incurred; but as this discussion involves no question of constitutional law, it is here omitted. The judgment of the District Court forfeiting the vessel was accordingly reversed.

*RESPECTIVE POWERS OF CONGRESS AND THE
PRESIDENT AS TO THE CREATION AND AP-
POINTMENT TO OFFICES OF THE UNITED
STATES.*

The United States v. Maurice and Others.

Circuit Court, District Va. and N. C., May Term, 1833, before Marshall, Chief Justice.

[2 Brockenbrough's Reports, 96-118.]

The propositions of law decided in this case are these:

That under the Constitution of the United States, all offices of the General Government, except where the Constitution itself otherwise provides, must be created or established by Congress, and the President has the power to appoint to office as provided in the Constitution (art. II, sec. 2), and to appoint inferior officers as may be provided by law.

The facts are stated in the opinion of the Chief Justice, which, so far as relates to the constitutional question involved, is as follows:

MARSHALL, Chief Justice. This is an action of debt brought upon a bond executed on the 18th day of August, 1818, in the penalty of twenty thousand dollars, with the following condition: "Whereas the said James Maurice has been appointed agent for
fortifications on the part of the United
States, now, therefore, if the said James Maurice shall truly and faithfully execute and discharge all the duties appertaining to the said office of agent, as aforesaid, then the above obligation to be void," etc. The breach as-

Statement of facts.

signed in the declaration is, that large sums of money came to the hands of the said Maurice, as agent of fortifications, which he was bound by the duties of his office faithfully to disburse and account for, a part of which, namely, forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse to the use of the United States, or account for; wherefore, etc.

The defendants, the sureties in the said obligation, prayed oyer of the bond, and of the condition, and then demurred to the declaration. The plaintiff joined in the demurrer.

The first point to be considered is the demurrer to the declaration.

The defendants insist that the declaration cannot be sustained because the bond is void in law, it being taken for the performance of duties of an office, which office has no legal existence, and, consequently, no legal duties. No violation of duty, it is said, can take place when no duty exists.

Since the demurrer admits all the facts alleged in the declaration which are properly charged, and denies that those facts create any obligation in law, it must be taken as true that James Maurice was in fact appointed an agent of fortifications on the part of the United States; that he received large sums of money in virtue of that appointment, and has failed to apply it to the purpose for which he received it, or to account for it to the United States.

As the securities certainly intended to undertake that Maurice should perform the very acts which he has failed to perform, and as the money of the nation has come into his hands on the faith of this undertaking, it is the duty of the court to hold them responsible, to the extent

of this undertaking, unless the law shall plainly interpose its protecting power for their relief, upon the principle that the bond creates no legal obligation. Is this such a bond? The first step in this inquiry is the character of the bond.

First step in this inquiry is the character of the bond.

Does it, on its face, purport to be a mere official bond, or to be in the nature of a contract? This question is to be answered by a reference to the terms in which its condition is expressed. These leave no shadow of doubt on the mind. The condition refers to no contract, states no undertaking to perform any specific act, refers to nothing, describes nothing which the obligor was bound to do, except to perform the duties of an officer. It recites that he was appointed to an office, and declares that the obligation is to be void if he "shall truly and faithfully execute and discharge all the duties appertaining to the said office." Of the nature of those duties no information whatever is given. Whether the disbursement of public money does or does not constitute a part of them is a subject on which the instrument is entirely silent.

The bond, then, is on its face completely an official bond, given, not for the performance of any contract, but for the performance of the duties of an office, which duties were known, and had been prescribed by law, or by persons authorized to prescribe them.

The bond is on its face an official one.

In his declaration the attorney for the United States has necessarily taken up this idea, and proceeded on it. In his assignment of breaches he states that the said James Maurice had been appointed agent of fortifications, and alleges that he had not performed the

Attorney for United States in his declaration proceeds on the idea of the bond being an official one.

duties of the said office, nor kept the condition of his bond, but that the said condition is broken in this, that, while he held and remained in the said office, divers large sums of money came to his hands, as agent of fortifications, which he was bound by the duties of his office faithfully to disburse and account for; a part of which,

This action is founded alone on breach of official duty, which constituted a breach of condition of bond.

forty thousand dollars, he has, in violation of his said duty, utterly failed to disburse or account for. On this breach of his official duty, which is alleged to constitute a breach of the condition of his bond, the action is founded. No allusion is made to any other circumstance whatever, as giving cause of action.

The suit, then, is plainly prosecuted for a violation of the duty of office, which is alleged to constitute a breach of an official bond. The court must, on this demurrer, at least, so consider it, and must decide it according to those rules which govern cases of this description. This being a suit upon an official bond, the condition of which binds the obligors only that the officer should perform the duties of his office, it would seem that the obligation

Defendants contend that no such office exists.

could be only co-extensive with these duties. What is their extent? The defendants contend that no such office exists; that James Maurice was never an officer, and, of consequence, was never bound by this bond to the performance of any duty whatever.

To estimate the weight of this objection, it becomes necessary to examine the Constitution of the United States, and the acts of Congress in relation to this subject.

The Constitution (article 2, section 2) declares that the president "shall nominate, and, by and with the advice

and consent of the Senate, shall appoint ambassadors," etc., "and all other officers of the United States, whose appointments are not herein otherwise provided for, and which shall be established by law."

Words of the Constitution of the United States, art. 2, sec. 2, as to appointments to office.

I feel no diminution of reverence for the framers of this sacred instrument, when I say that some ambiguity of expression has found its way into this clause. If the relative, "*which*," refers to the word "appointments," that word is referred to in a sense rather different from that in which it had been used. It is used to signify the act of placing a man in office, and referred to as signifying the office itself. Considering this relative as referring to the word "offices," which word, if not expressed, must be understood, it is not perfectly clear whether the words, "which" offices "shall be established by law," are to be construed as ordaining that all offices of the United States shall be established by law, or merely as limiting the previous general words to such offices as shall be established by law. Understood in the first sense, this clause makes a general provision that the President shall nominate, and, by and with the consent of the Senate, appoint to all offices of the United States, with such exceptions only as are made in the Constitution; and that all offices (with the same exceptions) shall be established by law. Understood in the last sense, this general provision comprehends those offices only which might be established by law, leaving it in the power of the executive, or of those who might be intrusted with the execution of the laws, to create, in all case of legislative omission, such offices as might be deemed necessary for their execution, and afterwards to fill those offices.

I do not know whether this question has ever occurred to the Legislative or Executive of the United States, nor how it may have been decided. In this ignorance of the course which may have been pursued by the Government, I shall adopt the first interpretation, because I think it accords best with the general spirit of the Constitution, which seems to have arranged the creation of office among legislative powers, and because, too, this construction is, I think, sustained by the subsequent words of the same clause, and by the third clause of the same section.

Interpretation of Constitution.

The sentence which follows, and forms an exception to the general provision which had been made, authorizes Congress "by law to vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." This sentence, I think, indicates an opinion in the framers of the Constitution that they had provided for all case of offices.

The third section empowers the President "to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of the next session."

Wording of the third section of the Constitution.

This power is not confined to vacancies which may happen in offices created by law. If the convention supposed that the President might create an office, and fill it originally without the consent of the Senate, that consent would not be required for filling up a vacancy in the same office.

The Constitution, then, is understood to declare that all offices of the United States, except in cases where the

Constitution itself may otherwise provide, shall be established by law.

Has the office of agent of fortifications been established by law?

This question is elaborately considered and the conclusion reached that the sureties on the bond were liable thereon to the extent of their undertaking.

NOTE

As to Federal offices and power to appoint and remove, see *Ex parte Hennen*, 13 Peters, 230, 257; *United States v. Le Baron*, 19 Howard, 73, 78; *United States v. Germaine*, 99 U. S. 508, 509; *Ex parte Siebold*, 100 U. S. 371; *Mullan v. United States*, 140 U. S. 240; *Parsons v. United States*, 167 U. S. 324, 328; *United States v. Eaton*, 169 U. S. 331, 343; *Miller*, Const. U. S., ch. III; *Tucker*, Constitution, II, pp. 732-742; *Story on Constitution*, ch. XXXVII. See *Marbury v. Madison*, *ante*, pp. 1-41.

In *Parsons v. United States* (*supra*), Mr. Justice Peckham gives an interesting resumé of the legislative, executive and judicial history of the power of the President with respect of removals from office, including a discussion of the purpose of Congress in the repeal of the Tenure of Office sections of the Revised Statutes. It was here held that it was the purpose of Congress in the repeal of the Tenure of Office sections of the Revised Statutes, to invest the President with the power of removal, and to enable the President to remove from office when in his discretion he regarded it for the public good, although the term of office might have been limited by the words of the statute creating the office. A critical reference (pp. 335, 336) is made to the opinion of Chief Justice Marshall in *Marbury v. Madison*. In the *United States v. Eaton* (*supra*), it was held that Congress had the constitutional power to authorize the President to appoint a subordinate officer, such as a Vice-consul. The ground for this conclusion is elaborately stated by Mr. Justice White.

CHRONOLOGICAL DATA.

- 1755 John Marshall born September fourth, in village of Germantown, Fauquier county, Virginia.
- 1758 About this year Marshall's father moved to a place called "The Hollow," in the heart of the Blue Ridge Mountains, and in this home the family remained until 1769.
- 1769 John Marshall went to Westmoreland county, where he received instruction in Latin from a clergyman named Campbell for about a year.
- 1770 Marshall's father removed to "Oak Hill," Fauquier county, and whither John Marshall went on return from Westmoreland county.
- 1775 September, entered the army as a subaltern.
- 1779 Attended a course of law lectures by Chancellor Wythe at William and Mary College.
- 1780 Licensed to practice law.
- 1781 Resigned his commission in the army.
- 1782 Elected to the Legislature of Virginia and a member of Executive Council of the State.
- 1783 Married to Mary Willis Ambler in January and removed to Richmond soon after.
- 1784 Resigned his seat in Executive Council and came to the bar.
Served in the Legislature in years 1784, 1787 to 1792, and 1795.
- 1787 Re-elected to the Legislature for the City of Richmond.
- 1788 Member of Federal Convention to reject or ratify Constitution of United States.
- 1795 Declined Attorney-Generalship offered him by Washington.
- 1796 Declined position of Minister to France.

- 1797 Appointed by Adams Envoy-Extraordinary to France in connection with Pinckney and Gerry.
- 1799 Elected a member of Congress and declined the place of associate justice of Supreme Court of United States.
- 1800 Appointed Secretary of War and on retirement of Pickering appointed Secretary of State.
- 1801 January 31st appointed Chief Justice of Supreme Court of United States.
- 1829 Member of Virginia State Constitutional Convention.
- 1831 Operation performed on Marshall at Philadelphia by Dr. Physick.
- 1835 Died at Philadelphia, July 6th.
- 1901 Centennial Celebration February 4 throughout the United States of Marshall's appointment as Chief Justice; the proceedings whereof, including orations and addresses, appear in the "Marshall Memorial." (See Preface, *ante*, p. iv.)

LIST OF THE CHIEF JUSTICES

Of the Supreme Court of the United States from its organization in
1789 to the date of Marshall's death in 1835.

NAMES.	STATE.	BY WHOM APPOINTED.	TERM OF SERVICE.
John Jay..... 1745-1829.	New York.	Washington.	1789-1795 Resigned
John Rutledge..... 1739-1800.	South Carolina.	Washington.	1795 Not confirmed
Oliver Ellsworth..... 1745-1807.	Connecticut.	Washington.	1796-1799 Resigned
John Marshall..... 1755-1835.	Virginia.	J. Adams.	1801-1835 Died

LIST OF THE ASSOCIATE JUSTICES

Of the Supreme Court of the United States from its organization in
1789 to the date of Marshall's death in 1835.

NAMES.	STATE.	BY WHOM APPOINTED.	TERM OF SERVICE.
John Rutledge..... 1789-1800.	South Carolina.	Washington.	1789. Did not qualify.
William Cushing.... 1782-1810.	Massachusetts.	Washington.	1789-1810. Died.
James Wilson..... 1742-1798.	Pennsylvania.	Washington.	1789-1798. Died.
John Blair..... 1782-1800.	Virginia.	Washington.	1789-1795. Resigned.
Robert H. Harrison.. 1745-1790.	Maryland.	Washington.	1789. Did not qualify.
James Iredell..... 1751-1799.	North Carolina.	Washington.	1790-1799. Died.
Thomas Johnson.... 1782-1819.	Maryland.	Washington.	1791-1798. Resigned.
William Paterson... 1744-1806.	New Jersey.	Washington.	1798-1806. Died.
Samuel Chase..... 1741-1811.	Maryland.	Washington.	1796-1811. Died.
Bushrod Washington. 1768-1829.	Virginia.	J. Adams.	1798-1829. Died.
Alfred Moore..... 1735-1810.	North Carolina.	J. Adams.	1799-1804. Resigned.
William Johnson.... 1771-1834.	South Carolina.	Jefferson.	1804-1834. Died.
Brockholst Living- ston, 1757-1828..	New York.	Jefferson.	1806-1828. Died.
Thomas Todd..... 1765-1826.	Kentucky.	Jefferson.	1807-1826. Died.
Joseph Story..... 1779-1845.	Massachusetts.	Madison.	1811-1845. Died.
Gabriel Duvall..... 1751-1844.	Maryland.	Madison.	1811-1835. Resigned.
Smith Thompson.... 1767-1843.	New York.	Monroe.	1823-1843. Died.
Robert Trimble..... 1776-1828.	Kentucky.	J. Q. Adams.	1826-1828. Died.
John McLean..... 1785-1861.	Ohio.	Jackson.	1829-1861. Died.
Henry Baldwin..... 1779-1844.	Pennsylvania.	Jackson.	1830-1844. Died.
James Moore Wayne. 1790-1867.	Georgia.	Jackson.	1835-1867. Died.

ATTORNEYS-GENERAL OF THE UNITED STATES

1789-1888.

NAMES.	STATE.	BY WHOM APPOINTED.	TERM OF SERVICE.
Edmund Randolph, 1758-1818.	Virginia.	Washington.	1789-1794
William Bradford, 1755-1795.	Pennsylvania.	Washington.	1794-1795
Charles Lee, 1758-1815.	Virginia.	Washington and J. Adams.	1795-1801
Levi Lincoln, 1749-1830.	Massachusetts.	Jefferson.	1801-1805
Robert Smith, 1757-1842.	Maryland.	Jefferson.	1805
John Breckenridge, 1760-1806.	Kentucky.	Jefferson.	1805-1806
Cæsar Augustus Rodney, 1772-1824.	Delaware.	Jefferson and Madison.	1807-1811
William Pinkney, 1764-1822.	Maryland.	Madison.	1811-1814
Richard Rush, 1780-1859.	Pennsylvania.	Madison.	1814-1817
William Wirt, 1772-1834.	Virginia.	Madison.	1817-1829
John McPherson Berrien, 1781-1856.	Georgia.	Jackson.	1829-1831
Roger Brooke Taney, 1777-1864.	Maryland.	Jackson.	1831-1833
Benjamin Franklin Butler, 1795-1868.	New York.	Jackson and Van Buren.	1833-1838.

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From its organization to 1848.

1789-1817 Alexander J. Dallas, Pennsylvania..... Reported from 1789 to 1801.
 1789-1835 William Cranch, Massachusetts..... Reported from 1801 to 1816
 1788-1848 Henry Wheaton, New York..... Reported from 1816 to 1838
 1780-1848 Richard Peters, Jr., Pennsylvania..... Reported from 1838 to 1848.

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